

NOTICE OF INTENT  
STATEMENT OF CONSIDERATION RELATING TO:

401 KAR 5:074

Natural Resources and Environmental Protection Cabinet  
Department for Environmental Protection  
Division of Water

I. The public hearing regarding the Notice of Intent to promulgate new administrative regulation 401 KAR 5:074 was held May 22, 2001, at 6:30 p.m. Central Time at the Madisonville Technical College in Madisonville, Kentucky.

II. The following people attended the public hearing or submitted oral or written comments:

<u>Name and Title</u>	<u>Affiliation</u>
Debby Allen	Kentuckians For The Commonwealth
Garrett Addington	ECM, Inc.
Eddie Akers	Floyd Co. Farm Bureau
Adam Andrews	Kentucky Farm Bureau
Charles Anderson	Citizen
Bobby J. Arnold	Citizen
Terry Ashby	Perdue Farms
Glen B. (illegible)	Johnson Co. Farm Bureau
Nobe Baker	Citizen
Charles Bates	Citizen
Edna Bates	Citizen
Glynn Beck	KY Geological Survey
Julious Begley	Citizen
Betsy Bennett	Sierra Club
Thomas B. Brackman	ECM, Inc.
Dolly Burchett	Pike Co. Farm Bureau
John Burrow	Tyson Foods
Mike Caldwell	Cobb Vantress – Avian Division
Rodney Campbell	Pike Co. Farm Bureau
Bill Cochran, President	KY Pork Producers
Berry Combs, Jr.	Breathitt Co. Farm Bureau
Bob Cote	Cobb-Vantress
Chris Creech	Perdue Farms

Susan Crosswait	Kentuckians For The Commonwealth
Linda Dempsey, Registered Respiratory Therapist	Citizen
Paula J. Dennison	Hopkins Co. Joint Planning Commission
Aloma Dew	Sierra Club
Lee A. Dew	Sierra Club
Henry Duncan	Ag Water Quality Liaison
Bernardine Edwards	Citizen
Charles Woody Everley	Perdue Farms
Tom FitzGerald	Kentucky Resources Council
Kimberly Fogo	Democracy Resource Center
Rebeckah Freeman, Director, Natural Resources	Kentucky Farm Bureau
Jackie Fugate	Citizen
Lacy Fuller	Citizen
Roger Gamble	Citizen
J. B. Gilliam	Pike Co. Farm Bureau
Sam Gilkey	The Messenger (Madisonville)
Deborah Givens	Citizen
Roger Givens	Kentuckians For The Commonwealth
W.H. Graddy, Attorney	Sierra Club, Cumberland Chapter
Otis Griffin	Farmer
Teena Halbig	Floyds Fork Environmental Association
Michael Hancock	KY Transportation Cabinet
Charles E. Hardin	Breathitt Co. Farm Bureau
Guy Hardin	Citizen; Take Back Kentucky
Wade Hampton Helm	Kentucky Conservation Committee
Larry Hooper	Perdue Farms
Ineda Howard	Citizen
Emily Hughes	Citizen
Lynche Hughes	Citizen
Patrick Jennings	Kentucky Farm Bureau
Steve Johnsen	Tyson
Bonnie Jolly	KY Pork Producers Association
Dave Juenger	Cobb-Vantress, Inc
David G. Jurgens	Perdue Farms
Thomas W. Keeth	Johnson Co. Farm Bureau
Rita Kelley	Tyson Producer
Mary Kay King	Sierra Club
Victor Kennedy	Citizen
Carole Knoblett	Kentucky Poultry Federation
Joe Knoepfler	Citizen
Kevin V. Koehn	Tyson Producer
Fred Lewis	Citizen
Faye Liar	Citizen
Ira Linville, Env Specialist	KY Department of Agriculture
Dennis Liptrap	Hubbard Feeds

Jerry Lock  
Chera Logsdon  
P.J. Logsdon  
John Lucas  
Heather Roe Mahoney  
Pat Martin  
Jack McAllister  
Howard McGregor  
Ted Merryman  
Bernis Miller  
Don Miniard  
Joanne Miniard  
Brent Missinger  
Nathan Mudd  
James B. Mullins  
W. Roger Murray  
Mike Ovesen  
Don Pemberton  
Bill Payne  
Thomas H. Porter  
Rankin Powell  
Burl Preston  
Glenda Preston  
Barry W. Rickard  
Sondra Rickard  
Morgan Rickard  
Hunter Roberts  
Vera Roberts  
Stephanie Z. Robey  
Joe B. Rogers  
Neveleen Rogers  
Michael Russell  
Sue Anne Salmon  
Chris Settles  
John D. Shocklee  
Roger Shocklee  
Mr. & Mrs. Wesley Slaton  
James Smallwood, Vice President  
Carolyn Sorrell  
David C. Sparrow  
Debra Staley, Solid Waste Coordinator  
Allan Stephens  
Robert Stewart  
Keith Tapp, President  
Barbara Edwards Thomas

Poultry Grower  
Perdue Farms  
Perdue Farms  
Evansville Courier Press  
Democracy Resource Center  
CFA, KFTC, KWA, Sierra Club  
Kentucky Milk Producers  
McGregor's Orchards  
Citizen  
Citizen  
Citizen  
Citizen  
Citizen  
Democracy Resource Center  
Breathitt Co. Farm Bureau  
Johnson Co. Farm Bureau  
KY Pork Producers Association  
Citizen  
Kentucky Milk Producers  
Farmer  
Citizen  
Producer  
Producer  
Perdue Farms Grower  
Perdue Farms Grower  
Farmer  
Citizen  
Citizen  
Auditor of Public Accounts  
Citizen  
Citizen  
Tyson Foods  
Citizen  
Citizen  
Grower  
Grower  
Farmer  
Pike Co. Farm Bureau  
Fox Creek Cattle Company  
UK/College of Agriculture  
Cumberland County  
Tyson Foods  
Breathitt Co. Farm Bureau  
Webster Co. Farm Bureau  
Citizen

Kelly Thurman  
 John Tomlinson  
 R.C. Trunnell  
 Mark Turner  
 Ronni Turner  
 Redmon Utley  
 Virginia Utley  
 Scott Vander Ploeg  
 Judith A. Villines, Attorney,  
 James Ward  
 Thomas A. Wehrenberg  
 Karol Welch, Magistrate  
 Corrine Whitehead  
 Jay Wilkerson  
 Ann Wilkerson  
 Danny Wilkinson  
 Barton Williams  
 Holden G. Williams  
 Harry D. Wilson  
 Judith G. Wilson  
 Danny Wilkinson  
 Patty J. Wilson  
 Sheila Wright  
 Todd Wright  
 Ruth Zimmerman

Kentucky Milk Producers  
 Citizen  
 Citizen  
 Farmer  
 Breathitt Co. Farm Bureau  
 Citizen  
 Citizen  
 Kentuckians For The Commonwealth  
 Stites & Harbison (for Tyson and Perdue)  
 Martin Co. Farm Bureau  
 Tyson Foods  
 First District, Hopkins County  
 Coalition for Health Concern  
 Kentuckians For The Commonwealth  
 Kentuckians For The Commonwealth  
 Wilkinson Farms  
 Cobb Vantress – Avian, Division  
 Breathitt Co. Farm Bureau  
 Jackson Co. Farm Bureau  
 Jackson Co. Farm Bureau  
 Wilkinson Farms  
 Citizen  
 Pike Co. Farm Bureau  
 Tyson Foods  
 Citizen

III. The following people from the promulgating administrative body attended the public hearing:

Name/Title

\*Jack A. Wilson, Director  
 Robert W. Ware, Asst. Director  
 Bruce Scott, KPDES Branch Manager  
 Julie B. Duncan  
 Larry Dusak, Regulation Coordinator  
 Maleva Chamberlain  
 Donald Hayes  
 Mark York  
 Lynette Koller

Affiliation

Division of Water  
 Division of Water  
 Division of Water  
 Division of Water  
 Division of Water  
 Division of Water  
 Division of Water  
 NREPC, Secretary's Office  
 Court Reporter

\*Agency Representative

#### IV. Summary of Written and Oral Comments Received and the Division of Water's Responses

##### (1) **Subject: No Emergency**

- (a) Comment: Carole Knoblett, Kentucky Poultry Federation  
Thomas Keith, Johnson County Farm Bureau  
James Ward, Martin County, Farm Bureau  
Eddie Akers, Floyd County, Farm Bureau  
Breathitt County Farm Bureau Members  
Pike County Farm Bureau Members  
Ineda Howard, Citizen  
Julious Begley, Citizen  
Joanne Miniard, Citizen  
Don Miniard, Citizen  
Nobe Baker, Citizen  
Fred Lewis, Citizen  
John Tomlinson, Citizen  
Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
Billy Cochran, KY Pork Producers

What is the emergency? There is no evidence that any livestock or poultry operation in this state threatens public health, safety or welfare, or the environment. What is the emergency that you (State) must issue new regulations when the other regs have just expired? These emergency regs are "so vital" that neither Secretary Bickford nor the Governor has ever made it a priority to attend any of these hearings. In the last year the State of Kentucky has had environmental catastrophes such as leaking radiation from a plant, a world record coal slurry spill, and a burning whiskey Distillery that killed fish for miles in the Kentucky River. Yet, what (agricultural) emergency are we addressing here?

(b) Response: The Statement of Emergency was declared by Governor Paul Patton on February 11, 2000. As the Statement of Emergency notes, "Changes in the beef, dairy, poultry, and pork industries have brought a heightened federal interest in concentrated animal feeding operations nationwide. This has created an urgent need to update the federally delegated Kentucky Pollutant Discharge Elimination System (KPDES) permitting program. In addition, the United States Environmental Protection Agency has published a draft administrative regulation governing concentrated animal feeding operations in the *Federal Register*, and is under a federal consent decree to finalize that administrative regulation. Therefore, in order to protect human health and the environment, an emergency administrative regulation must be placed into effect immediately". Governor Patton ordered the Natural Resources and Environmental Protection Cabinet to develop the proposed administrative regulation to protect human health and the environment.

There are waters in Kentucky with moderate to significant water quality impairment attributed to agriculture impacts. The 2000-2001 update to the Kentucky Report to Congress on Water Quality provides the Division of Water's most recent assessment of water quality conditions and trends. This update reflects changes from the most recent monitoring data developed for the Kentucky, Salt, and Licking River Basins. Agriculture continues to be a significant source of nonsupport of beneficial waterbody use. For those waters assessed,

agricultural related pollution was the attributed cause of nonsupport in 1,286 miles of streams and 9,050 acres of lakes in Kentucky. The Cabinet maintains that this administrative regulation is an integral part of addressing the water quality problems remaining in Kentucky's waterbodies.

**(2) Subject: No Emergency**

(a) Comment: Dennis Liptrap, Hubbard Feeds

This regulation is far outside the allowable limits for promulgating an emergency regulation. The Cabinet is also proposing an emergency regulation when no emergency exists in Kentucky and the federal regulations are a long way from being finalized.

(b) Response: See response to comment #1.

**(3) Subject: Emergency**

(a) Bernadine Edwards, Citizen

"I'm overwhelmed with the Factory Farms (chicken) near my home. The foul air and consistent pollution to water and air is profoundly destroying my beautiful farm and my health."

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(4) Subject: Emergency**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club  
Wade H. Helm, Kentucky Conservation Committee

The Sierra Club agrees that an emergency exists and supports the Governor's and the Cabinet's determination of a need to promulgate an emergency regulation and permanent regulations for beef, dairy, poultry and swine concentrated animal feeding. It is a nationwide problem (that is) at least 28 years old. In CARE v. Henry Bosma Dairy, 65 F.Supp.2d 1129 (E.D. Wa. 1999), the District Court found these dairies, with a total of 5,250 dairy cows, were CAFOs and were strictly liable for violations of the Clean Water Act. The Court had evidence that the fecal coliform levels in water flowing off the dairies ranged from 470 colonies/100 ml to 650,000 colonies/100 ml.

(In addition,) The number of broilers in Kentucky has grown from less than 2 million in 1990 to an estimated 172 million in 1998 and an estimated 231 million in 2001. The number of chicken houses has grown from a very low number to between 2000 and 3000. The Division of Water records show chicken houses in 36 counties, with about 176 of these having over 1,000 animal units. The odor problems and the pest problems are well known.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(5) Subject: Emergency**

(a) Comment: Linda Dempsey, Citizen

"Histoplasmosis is a disease that is brought on by airborne spores from excreta from infected birds. Our chances of getting this disease are multiplied due to the large number of chicken houses in this area and how the droppings are handled. Please, for everyone's health involved, keep the regulations in place!"

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(6) Subject: No Need for Regulations**

(a) Comment: Thomas Keith, Johnson County Farm Bureau  
James Ward, Martin County, Farm Bureau  
Eddie Akers, Floyd County, Farm Bureau  
Breathitt County Farm Bureau Members  
Pike County Farm Bureau Members  
Ineda Howard, Citizen  
Julious Begley, Citizen  
Joanne Miniard, Citizen  
Don Miniard, Citizen  
Nobe Baker, Citizen  
Fred Lewis, Citizen  
John Tomlinson, Citizen

Why do we need regulations? The Legislature found the previous regulations deficient, therefore they didn't consider them necessary. These are substantially the same as the previous regulations. Laws already exist that regulate discharges to the waters of the Commonwealth. New regulations are not required.

(b) Response: The Cabinet has determined that agriculture operations contribute to water quality degradation. In February 1998, the Clean Water Action Plan (CWAP) identified polluted runoff as the most important remaining source of water pollution. The CWAP calls for the development of an USDA-EPA unified national strategy to minimize the water quality and public health impacts of animal feeding operations. This strategy was published on March 9, 1999 and includes the elements being implemented by the Cabinet in the proposed administrative regulation and the proposed CAFO General KPDES permits.

The Statement of Emergency was declared by Governor Paul Patton on February 11, 2000. As the Statement of Emergency notes, "Changes in the beef, dairy, poultry, and pork industries have brought a heightened federal interest in concentrated animal feeding operations nationwide. This has created an urgent need to update the federally delegated Kentucky Pollutant Discharge Elimination System (KPDES) permitting program. In addition, the United States Environmental Protection Agency has published a draft administrative regulation governing concentrated animal feeding operations in the *Federal Register*, and is under a federal consent decree to finalize that administrative regulation. Therefore, in order to protect human health and the environment, an emergency administrative regulation must be placed into effect immediately". Governor Patton ordered the Natural Resources and Environmental Protection Cabinet to develop the proposed administrative regulation to protect human health and the environment.

**(7) Subject: No Need for Regulations**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture  
It is important to note that the Cabinet, under the Clean Water Act, already has the authority to address required enforcement actions, discharge control, a required permit and corrective measures for permitted discharges. This is federal law.

The KNDOP and the KPDES permits meet the federal effluent limitation guideline requirements of 40 CFR Part 412- Feedlots Point Source Category. The federal guidelines have been used in the past to successfully defend the KNDOP to the US EPA. In addition, the

Agriculture Water Quality Act (AWQA), KRS 224.71-100 and –140, provides for developing water quality plans and best management practices (BMPs). Therefore, current authority exists for the Cabinet to issue permits making the permanent regulation unnecessary.

EPA is re-interpreting its federal laws and regulations, and is encouraging states to make changes in a similar fashion. No state should make changes to their laws until the federal laws have been revised or promulgated.

(b) Response: The proposed administrative regulation is necessary to set forth a “bright line test” for integrator liability and to standardize Best Management Practices by creating specific setbacks for the permits. They are in accordance with the federal Clean Water Act requirements.

**(8) Subject: No Need for Regulations**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture  
Withdraw the proposed regulation 401 KAR 5:074E and follow the normal promulgation process after the US EPA has revised the federal effluent limitation guidelines and regulations for CAFOs.

Comply with 13A.120 by making any new regulation no more stringent than the federal law. Incorporate the authority and responsibility of the Kentucky AWQA to provide BMPs to protect the environment, including provisions and a protocol for corrective measures. Develop regulations that are fair to the environmental community and the regulated community.

Take no action on co-permitting and integrator liability until the US EPA resolves these issues at the national level.

(b) Response: Because of the current emergency situation, Kentucky cannot wait for EPA to act. This proposed administrative regulation is in accord with federal Clean Water Act requirements and it is based on additional state statutory authority. Therefore, it is not more stringent than federal law or regulations.

**(9) Subject: No Need for Regulations**

(a) Comment: Bill Payne, Dairy Producer, Kentucky Milk Producer’s Association  
Current KNDOP permitting should be adequate. “No Discharge” is about as pollution free as possible. If a problem exists, enforce the current regulations. If no problem exists, then where is the environmental danger (emergency)?

Dairies can function in a “No Discharge” manner, if given the flexibility to do so. Good design and competent engineering will accomplish this goal (Not restrictions).

(b) Response: The Cabinet has a permitted inventory of 734 dairy operations under the KNDOP program, with over 1500 operations in our database. To our knowledge, four of those appear to have the sufficient number of animals to potentially qualify as a CAFO. As such, virtually all dairy operations will continue to be permitted under the KNDOP program. Those four, if they are indeed deemed CAFOs, would require a KPDES permit rather than a KNDOP permit. Both permits require “No Discharge”, and both permits require nutrient management plans. With respect to an environmental danger (emergency), one of the key components of this proposed administrative regulation is the establishment of siting criteria. Many of the problems that have occurred among CAFO operations are due to improper siting. Without this proposed administrative regulation there is no assurance that these problems will not be repeated.

**(10) Subject: No Need for Regulations**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation



Why can we not wait for the federal regulations to be in effect before we change the Kentucky regulations? If we change the regs now and they do not match the federal regs, we will have to start over again.

(b) Response: Because of the current emergency situation Kentucky cannot wait for EPA to act. The proposed administrative regulation is needed now to protect Kentucky's environment and is consistent with federal regulations now in effect. See response to comment #1.

**(11) Subject: No Need for Regulations**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

Once litter is placed inside a storage facility, and is no longer on the ground or in contact with rain, it is no longer a wet system. There is no need for a KPDES permit, which is a water discharge permit, if there is no discharge.

(b) Response: Each permit determination of a CAFO is made on a case-by-case basis. This will include poultry operations that construct the required permanent litter storage structure.

**(12) Subject: Need for Regulations**

(a) Comment: Corrine Whitehead, Coalition for Health Concern

Heather Roe Mahoney, Democracy Resource Center

Make sampling and analysis data (readily) available to the public in CAFO areas. Results of all soil and waste analyses should also be submitted to the Cabinet, so that the public will have access to this information prior to permit renewal. Record keeping for land application is essential to determine permit compliance. These records need to be submitted at least quarterly, so that neighbors can find out how much and how often material is being applied near their property.

(b) Response: The permit holder is required to submit a Comprehensive Nutrient Management Plan to the Cabinet, which addresses a number of testing requirements. In the event of a discharge, the operation must monitor the discharge and report the results to the Cabinet within 30 days. All other data must be maintained onsite and made available to a Cabinet representative upon request.

**(13) Subject: Need for Regulations**

(a) Comment: Emily Hughes, Citizen

We (public) are in danger from "contaminated (mycotoxin infected) feed grains" destined for animal consumption. Chicken farms lose huge numbers of diseased chickens daily and recycle them as feed to the other chickens, which are then sold to grocers. Likewise, with the pork producers. Where are the regulations that Senator Mitch McConnell says are in-place to protect the public from contaminated grain and airborne grain dust?

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(14) Subject: Need for Regulations**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

The health effects of the odors and gases emanating from these facilities is one of the key concerns expressed by citizens who live near these facilities or are facing the possibility of large swine feeding operations in their area. The empirical evidence that these facilities can cause obnoxious odors to those living up to one or two miles distant is persuasive. These regulations

contain no odor standard, no monitoring of odors and gases.

A narrative standard preventing these (CAFO) facilities from creating a nuisance by virtue of odor or runoff should be included in the regulations.

(b) Response: The Cabinet agrees that odor issues are one of the major concerns when dealing with CAFOs. The use of siting criteria, including setbacks, sets standards to address odor concerns. With regard to nuisance matters, the Cabinet is not proposing to address this. Nuisance issues are addressed at the local level via planning and zoning and/or health ordinances. Neighbors have common law rights concerning nuisance, which can also be addressed in the courts.

**(15) Subject: Need for Regulations**

(a) Comment: Joe Knoepfler, Citizen

I want to thank NREPC for the regulations. Cumberland County enacted a conservative and protective ordinance to regulate the industry. The ordinance is now the subject of a legal proceeding and if the ordinance fails, we will be protected by the regulations promulgated by the Cabinet. Those living near a broiler house will find their lives disrupted by the stench, flies, and the damage to our ground and water resulting from the effects of over nutrification.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(16) Subject: Individual Permits – Against**

(a) Comment: Bill Payne, Dairy Producer, Kentucky Milk Producer's Association

Pursuing the Individual KPDES process of holding hearings for existing businesses is patently unfair.

(b) Response: The proposed administrative regulation does not address the matter of individual or general KPDES permits. Other KPDES regulations, in place for over a decade, have always required public notice and possible hearings for these types of permits.

**(17) Subject: Individual Permits - Support**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

Aloma Dew, Sierra Club

Susan Crosswait, Kentuckians for the Commonwealth

Hunter and Vera Roberts, Citizens

Victor Kennedy, Citizen

Barbara Edwards Thomas, Citizen

All operations should apply for individuals KPDES permits so local residents have a chance to respond and let the Cabinet know about unique features in their area. Citizens must be guaranteed a realistic opportunity to have input into the permitting decisions. Costly and harmful permitting mistakes can be prevented if public notice of the proposed plans and comment are allowed before substantial investments in swine and poultry barns are made. (We) urge the Division to issue individual permits to all CAFOs rather than a blanket general permit. At the very least, individual permits should be required for new and/or expanding facilities.

(b) Response: The proposed administrative regulation does not address the matter of individual or general KPDES permits. Other KPDES regulations, in place for over a decade, have always required public notice and possible hearings for these types of permits.

**(18) Subject: Threat to Environment and Public Health**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club  
Aloma Dew, Sierra Club

In 2000, the Sierra Club conducted water quality sampling near poultry operations in Fulton, Hickman and McLean Counties (Kentucky). The 5 samples taken last May had fecal coliform results ranging from 500 col/100ml to 260,000 col/100ml. The June results at those sites ranged from 20,000 col/100ml to 116,000 col/100ml.

Three articles state that poultry workers are exposed to health hazards, including ammonia, endotoxins and histoplasmosis. The writers concluded that, even when well-ventilated, the air quality inside chicken houses creates a risk of respiratory problems for poultry workers so great that they should all wear breathing masks. If this is the risk to people who go into poultry houses from time to time, what about the risk of people who live next to the houses and who have fans aimed at their front porch? (Must) they breathe what is being well-ventilated out of the houses onto their property?

Individuals were nauseated and had respiratory problems and one individual had a rash, which required medical treatment, after being exposed to blowing dust and manure from a tour of poultry operations. This is nothing compared to those (neighbors) who must put up with noise, flies, dust, odor, mice and rats on a daily basis. Several children that live near poultry and litter-spreading operations have histoplasmosis (no evidence of a connection). We believe that the regulations are too lax in some areas and do not believe that the present regulations are being enforced adequately.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment. The Cabinet concurs that enforcement of any regulation is vital.

**(19) Subject: Threat to Environment and Public Health**

(a) Comment: Tom FitzGerald, Kentucky Resources Council

Intensive poultry operations, while producing litter which absorbs much of the liquid waste, generates significant waste material, odor, flies and associated air and water pollution problems similar to those of intensive hog operations. Swine and poultry wastes are highly concentrated sources of organic and inorganic nutrients, fecal coliforms, and other pathogenic microorganisms, and chemical oxygen demand. Mallin, et al., *Journal of Environmental Quality* 26:1622-1631 (1997). The Council believes that the environmental and human health costs associated with these industrial-scale operations and the management of the wastes and wastewaters generated by these facilities must be fully accounted for by the facilities and those who control the production decisions. (Instead, airborne odors, pathogens and air toxic emissions are) being externalized through groundwater or surface water pollution, contamination of agricultural land, loss of property values and loss of use and enjoyment of other properties.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(20) Subject: Threat to Environment and Public Health**

(a) Comment: Karol Welch, Magistrate, Hopkins County

The odor from factory hog and chicken operations is nauseating and at times makes one's throat

burn for days. People don't even want to be outside. Children waiting for the school bus have become sick on mornings when the air is still.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(21) Subject: Threat to Environment and Public Health**

(a) Comment: Tom FitzGerald, Kentucky Resources Council

A modern industrial-type swine operation includes one or more hoghouses holding potentially hundreds or thousands of animals, an automated feeding system, slatted metal floors with a feces and urine collection system, an anaerobic lagoon, and fields for land disposal of partially decomposed wastes. The environmental problems associated with intensive hog operations arise in great extent because too many animals are confined in one place, creating a significant waste and wastewater volume containing high levels of nitrogen, phosphorus, and other constituents such as certain metals, that must be managed and disposed. Cahoon's, *Hogs Threaten Disease As Well As Pollution*, (1995) indicates that hogs produce a large amount of waste per animal, various estimates give figures of 2 to 10 times as much as a human per day. The waste products of such facilities, although posing significant environmental and health concerns not dissimilar from human waste, are managed in a much less rigorous fashion that creates a significant risk of on and off-site environmental contamination.

(b) Response: The Cabinet agrees that large scale swine operations, deemed CAFOs, need to be properly permitted and regulated.

**(22) Subject: Threat to Environment and Public Health**

(a) Comment: Corrine Whitehead, Coalition for Health Concern

Heather Roe Mahoney, Democracy Resource Center

Aloma Dew, Sierra Club

The use of antibiotics in feed and treatment of animals in CAFOs should be regulated. Present use in animals is diminishing the ability of drugs to treat diseases in humans (that consume the animals). An estimated 40 percent of antibiotics produced in the United States is fed to livestock as growth enhancers. A geochemist with the US Geological Survey in Raleigh, NC notes that some antibiotics are getting transported into surface and groundwaters from hog waste lagoons.

The potential exists for neighbors to be exposed to pathogens and antibiotics through;

- 1) Ingestion and contact with surface water (including drinking water supplies) contaminated by runoff of waste applied to the land, emergency discharges from overflowing lagoons during wet weather, and catastrophic lagoon failures; and;
- 2) Ingestion and contact with groundwater contaminated by seepage from manure storage areas, pits and lagoons, as well as land application, and wind- and air-borne pathogens from land application, and disease vectors, particularly flies carrying disease organisms from such facilities to surrounding areas.

There is nothing in the regulation to require even monitoring of the wastes for disease organisms. Neighbors and those living downwind must be protected from the health effects, and devaluation of property caused by odors.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment. The Cabinet does not regulate use of antibiotics in animals. With regard to mice or other rodent infestation problems, individuals should

contact the Department of Agriculture, Division of Pests and Weeds (502-575-7162). For health concerns related to mice or other rodents, individuals should contact the Cabinet for Health Services, Department for Public Health (502-564-4856), or the local health department in their area. The proposed administrative regulation is designed to address odor concerns via siting criteria, including setbacks, to protect human health and the environment.

**(23) Subject: Threat to Environment and Public Health**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club

The livestock and poultry industries are required to prevent waste generated in concentrated areas from causing serious harm to surface and ground waters. A system designed to handle the waste from a diverse, decentralized pasture based livestock system is inadequate to handle waste from an industrial system.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(24) Subject: Threat to Environment and Public Health**

(a) Comment: Bernadine Edwards, Resident

Eight chicken houses were constructed in front of my house. Trees were bulldozed down and set afire. The smoke affected my husband, who suffered from emphysema. Manure is hauled out on the weekends, preventing me and my children and grandchildren from being able to enjoy the outdoors on our property.

(b) Response: The Cabinet notes the concern. This proposed administrative regulation is designed to protect human health and the environment. The specific concerns related to when manure is hauled and smoke related to burning trees are outside the scope of the proposed administrative regulation.

**(25) Subject: Threat to Environment and Public Health**

(a) Comment: Sue Anne Salmon

Unless strong regulations are created we have no protection from a new neighbor constructing a CAFO and exposing us to great risk from disease transmitted from animals to humans. More people died from the 1918 swine flu epidemic than were killed in battle in World War I. Just a few years ago in China, an avian flu killed several people. The only remedy was to destroy millions of chickens. Spongiform encephalopathy, the Mad Cow disease, has decimated the British cattle industry. It started by farmers feeding animal waste to their cows. Cholera killed hundreds of people in and around Evansville, Indiana in the 1800s and still occurs in many parts of the world. It is spread by flies from swine open-air waste lagoons or by hog waste runoff contaminating groundwater and streams. It is our moral and ethical responsibility to the future to safeguard Kentucky's groundwater and waterways.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment. With regard to mice or other rodent infestation problems, individuals should contact the Department of Agriculture, Division of Pests and Weeds (502-575-7162). For health concerns related to mice or other rodents, individuals should contact the Cabinet for Health Services, Department for Public Health (502-564-4856), or the local health department in their area. The proposed administrative regulation is designed to address odor concerns via siting criteria, including setbacks. This proposed administrative

regulation does not address transportation issues related to poultry litter.

**(26) Subject: Threat to Environment and Public Health**

(a) Comment: Bernis Miller, Citizen

We have two children who play in the front yard. Transporters are not covering the chicken manure. The smell and flies are horrible. What are the long-term effects on my girls?

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment. With regard to mice or other rodent infestation problems, individuals should contact the Department of Agriculture, Division of Pests and Weeds (502-575-7162). For health concerns related to mice or other rodents, individuals should contact the Cabinet for Health Services, Department for Public Health (502-564-4856), or the local health department in their area. The proposed administrative regulation is designed to address odor concerns via siting criteria, including setbacks.

**(27) Subject: Threat to Environment and Public Health**

(a) Comment: Debra Staley, Solid Waste Coordinator, Cumberland County

We in Cumberland County are very concerned about the chicken manure that is being put on the farms. Not only is the stench bad, but the citizens living near these farms cannot go out of doors after the chicken manure is spread. One citizen has complained of illness from the smell. Upper Cumberland Watershed Watch results show that Allen's Creek is losing aquatic life from the chicken houses located there. I believe that the spreading of manure near the stream will result in more loss of aquatic life.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(28) Subject: Threat to Environment and Public Health**

(a) Comment: Victor Kennedy, Citizen

"I am concerned over the quality of the air and water in my county."

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(29) Subject: KRS 13A Statutory Authority**

(a) Comment: Judith A. Villines, Attorney, Tyson Foods, Inc.

Judith A. Villines, Attorney, Perdue Farms, Inc.

Pursuant to KRS 13A.333(6), the Cabinet is barred from promulgating the proposed regulation. When a regulation expires, pursuant to KRS 13A.333(1) or (2), KRS 13A.333(6) then applies. KRS 13A.333(6) provides:

An administrative body shall be prohibited from promulgating an administrative regulation that is identical or substantially the same as an administrative regulation, which has expired pursuant to subsections (1), (2) and (4) of this section.

(In addition,) the language in the expired regulation, 401 KAR 5:072, and the proposed regulation 401 KAR 5:074, is substantially similar by all tests of KRS 13A.333(6)(b) and (c).

(b) Response: This proposed administrative regulation is substantially different from 401 KAR 5:072 and complies with KRS 13A.333(6).

**(30) Subject: General Statutory Authority**

(a) Comment: Judith A. Villines, Attorney, Tyson Foods, Inc.  
Judith A. Villines, Attorney, Perdue Farms, Inc.

The Cabinet continues to cite, as authority for the regulation, state statutes unrelated to the KPDES permitting process and the federal acts delegating the KPDES permitting process to Kentucky. Statutes KRS 224.10-100, 224.20-110 and 224.70-110 do not involve KPDES permitting and therefore cannot give authority for KPDES permitting of CAFO's. Nothing in the cited general state statutes gives an executive agency the authority to impose liability on a person who has no involvement in the activity that is subject to regulation.

(b) Response: In addition to its Clean Water Act authority the Cabinet has additional statutory authority to regulate these facilities and operators throughout the state and regardless of size. This authority can be relied upon in issuing the proposed administrative regulation.

**(31) Subject: General Stringency**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
This emergency regulation violates Kentucky Revised Statute (KRS) 13A.120 because it is more stringent than federal law requires.

(b) Response: This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

**(32) Subject: Stringency**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
The emergency regulation states its basis under the Clean Water Act and the NPDES Permits Program. It is contrary to KRS 224.16-050(4) which prohibits the Cabinet from imposing conditions in connection with KPDES permit that a more stringent than could be imposed under federal law.

(b) Response: This proposed administrative regulation relates to KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110, 224.20-120, 224.70-100, 224.70-110, and 33 U.S.C. § 1342 and the statutory authority for the proposed administrative regulation is KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110 and 33 U.S.C. § 1342. The proposed administrative regulation is based on more than the federal Clean Water Act. This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

**(33) Subject: Federal Guidance Documents**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
Natural Resources and Environmental Protection Cabinet maintains its position that federal guidance document support many of the regulation provisions. However, federal case law shows that USEPA guidance documents are not regulation or law.

(b) Response: The EPA administrator issues information and guidelines to the states in administering their programs. While guidance documents are not "regulation" or "law", they serve to show how EPA interprets its program and would issue a permit.

**(34) Subject: No Statutory Authority**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
KRS Chapter 13A.190(4) prohibits any administrative agency from promulgating emergency regulations that is the same or substantially similar to its previously promulgated emergency regulation.

(b) Response: KRS 13A.190(4) does not prevent the Cabinet from issuing this proposed administrative regulation following its issuance of the emergency administrative regulation.

**(35) Subject: KPDES Statutory Authority**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
When NREPC acts in its regulatory capacity, it cannot exceed the statutory authority, jurisdiction, or limitations set by the legislative branch. Department for Natural Resources and Environmental Protection v. Stearns Coal and Lumber Company, Ky., 563 S.W.2d 471, 473 (1978) (“the Cabinet cannot “add to the requirements established by the legislature for the issuance of a permit. ...”); Natural Resources and Environmental Protection Cabinet v. Pinnacle Coal Corp., Ky., 729 S.W.2d 438, 439 (1987) (Cabinet can not “adopt regulations in conflict with plain statutory provisions.”) In maintaining the regulation in its current form, Kentucky Farm Bureau believes that NREPC has acted contrary to state and federal legislative intent and abused its authorized agency discretion.

(b) Response: See responses to comment #s 30, 31 and 32.

**(36) Subject: Statutory Authority**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council  
KRS 224.70-110 prohibits direct or indirect discharge of any pollutant or substance that would cause or contribute to pollution, in contravention of any standards adopted by the Cabinet. This prohibition is broad enough to cover both point and non-point discharges onto lands which drain into water and which would cause an exceedance of water quality standards, since those standards apply to all sources of pollution, as was recognized in the state agriculture water quality plan (AWQP).

A mandate to prevent pollution arises under the KPDES program, as most recently recognized in the national unified strategy for animal feedlot operations. The prevention of nuisance associated with land application of wastes and solids in wastewater must conform to the environmental performance standards of 401 KAR Chapters 47 and 48. Additional authority and obligation to address management of wastes associated with intensive livestock operations arises under the state air quality regulations, and the prevention of fugitive dust and noxious odors through setback and other control mechanisms is authorized and indeed required under state law.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(37) Subject: Statutory Authority**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club  
The Cabinet correctly refers to KRS 224.10-100 as providing authority for the regulation. Section (5) of that statute states; “the Cabinet shall have the authority, power, and duty to: Provide for the prevention, abatement, and control of all water, land, and air pollution including, but not limited to, that related to particulates, pesticides, gases, dust, vapors, noise, radiation,



odor, nutrients, heated liquid, or other contaminants;”

KRS 224.70-100, declaring the policy of the Commonwealth regarding water quality, and the purposes of KRS 224 regarding water quality and KRS 224.70-110, the general prohibition against water pollution, also provide authority for this regulation.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(38) Subject: Stricter Than Federal Mandate**

(a) Comment: Danny Wilkinson, Farmer

New state regulations cannot be more stringent than the federal law. The livestock industry does not pose a threat to the public or the environment beyond the ability of the Clean Water Act to control. Two previous E-regs were deemed deficient by the legislature. The Cabinet already has enforcement authority under the Agriculture Water Quality Act and should devote its resources there.

(b) Response: See responses to comment #s 31 and 32.

**(39) Subject: Odor Stringency**

(a) Comment: Dennis Liptrap, Hubbard Feeds

Ira Linville, Environmental Specialist, KY Department of Agriculture  
Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
Judith A. Villines, Attorney, Tyson Foods, Inc.  
Judith A. Villines, Attorney, Perdue Farms, Inc.  
Billy Cochran, KY Pork Producers  
Bill Payne, Dairy Producer, Kentucky Milk Producer’s Association  
Keith Tapp, Webster Co. Farm Bureau

The proposed reg contains siting and setback requirements for CAFO’s and litter shed requirements for poultry operations that are not in the corresponding federal statutes or regulations. The Cabinet can recommend setback limits and regulate emission of airborne chemicals and odor, but cannot mandate setbacks for air quality issues. NREPC has violated the KRS 13A.120 and KRS 224.16-050(4) limitations and gone outside its jurisdiction by effectively regulating land-use planning with the inclusion of siting criteria and setbacks for odor in the KPDES emergency regulation.

(b) Response: The Cabinet has authority to regulate odors pursuant to KRS 224.20-100, 224.20-110, and 224.10-100. This does not constitute land use planning or zoning.

**(40) Subject: Stringency**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture  
Bill Payne, Dairy Producer, Kentucky Milk Producer’s Association  
Judith A. Villines, Attorney, Tyson Foods, Inc.  
Judith A. Villines, Attorney, Perdue Farms, Inc.

The Commonwealth of Kentucky should not take any action until the USEPA has resolved this issue at the national level. Action by the state will place our animal production industry at a disadvantage when competing with the other states in the same type of production. Kentucky should not fight the costly lawsuits for EPA. Authority vested in state law or federal law is the only authority that can be defended in court. State regulations stricter than federal requirements

are prohibited under KRS 224.16-050 and place our Kentucky producers on an unfair playing field.

(b) Response: See responses to comment #s 8, 31, and 32.

**(41) Subject: Stricter Than Federal Mandate**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture  
Bill Payne, Dairy Producer, Kentucky Milk Producer's Association  
Dennis Liptrap, Hubbard Feeds,  
Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
Judith A. Villines, Attorney, Tyson Foods, Inc.  
Judith A. Villines, Attorney, Perdue Farms, Inc.  
Billy Cochran, KY Pork Producers

The legal status of co-permitting or integrator liability is unclear. The federal NPDES program has limited the obligations under the program to a universe of persons that do not include integrators; the operator is responsible for obtaining a permit and complying with it when ownership and operation are split. The regulation is unlawful because it requires persons who are neither owners nor operators to be co-permittees on the permit and to be jointly and severally liable for violations. EPA intends the person with operational control over the facility to be the one required to submit a permit application. The Commonwealth of Kentucky should not take any action until the USEPA has resolved this issue at the national level. Action by the state will place our animal production industry at a disadvantage when competing with the other states in the same type of production. Kentucky should not fight the costly lawsuits for EPA. State regulations stricter than federal requirements are prohibited under KRS 224.16-050 and place our Kentucky producers on an unfair playing field.

(b) Response: See responses to comment #s 8, 31, and 32.

**(42) Subject: Stricter Than Federal Mandate**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture  
Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
Judith A. Villines, Attorney, Tyson Foods, Inc.  
Judith A. Villines, Attorney, Perdue Farms, Inc.

The Cabinet mirrors the federal definition of CAFO's with two exceptions: Federal law does not specify whether the NPDES permit should be general or individual. Secondly, federal regulation specifies 100,000 laying hens or broilers with continuous overflow watering systems or 30,000 laying hens or broilers with a liquid waste management system, for poultry to be included in a permit. The Cabinet is using 100,000 chickens without further qualification.

The federal NPDES permit program is limited to the regulation of discharges, not facility construction and siting, and under 224.16-050, the permit program is similarly restricted. Neither federal statute nor regulation allows NREPC to use point-source water quality permits to regulate odor / air quality, construction, siting or setback of facilities. These issues must be addressed by utilizing authority other than the KPDES permit program or by deferring action until such requirements are added to the federal NPDES program or it will lead to extensive litigation, legal failure, and further delays in addressing those issues.

(b) Response: 33 U.S.C. Section 1362 defines point source as follows: The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any

pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharge and returns close for irrigated agriculture. 33 U.S.C. 1362(14).

A CAFO meets the definition of point source. This includes the whole operation not just a particular discharge point. Congress did not define “concentrated animal feeding operations”, but the EPA has done so in the Code of Federal Regulations. Any operation that meets that definition is a point source.

In addition, in the USDA/USEPA’s *Draft Guidance Manual and Examples of NPDES Permits for Concentrated Animal Feeding Operations*, August 6, 1999, the EPA at Section 2.3.2 notes that poultry operations that remove dry litter waste from pens and stack it in areas exposed to rainfall may be considered to have established a crude liquid manure system. This reflects EPA’s interpretation of its program and indicates how EPA would issue federal NPDES permits.

This proposed administrative regulation is not issued only pursuant to the federal Clean Water Act. The proposed administrative regulation is also issued pursuant to the Cabinet’s authority under KRS 224.20-110, which gives the Cabinet authority to regulate air pollution, and pursuant to KRS 224.10-100(5), which gives the Cabinet authority to provide for the prevention of odor problems.

**(43) Subject: No Emergency**

(a) Comment: Dennis Liptrap, Hubbard Feeds

The Cabinet is proposing a regulation that is not significantly different than the previous emergency regulation, which was found deficient by the ARRS. The Cabinet did not make any effort to promulgate legislation in the most recent session to codify CAFO regulations.

(b) Response: See response to comment #29.

**(44) Subject: Stricter Than Federal Mandate**

(a) Comment: Judith A. Villines, Attorney, Tyson Foods, Inc.

Judith A. Villines, Attorney, Perdue Farms, Inc.

Because the poultry operations in Kentucky are overwhelmingly “dry-litter systems”, the proposed regulation encompasses poultry operations that are not within the definition of CAFO under federal Clean Water Act (CWA). Accordingly, the proposed regulation is more stringent. The Clean Water Act does not require KPDES permits for facilities unless they are point sources that discharge pollutants into navigable waters. The Cabinet has given no effect to the qualifying language relating to overflow watering and liquid manure systems.

(b) Response: See response to comment #42.

**(45) Subject: Stricter Than Federal Mandate - Unlawful Regulations**

(a) Comment: Judith A. Villines, Attorney, Tyson Foods, Inc.

Judith A. Villines, Attorney, Perdue Farms, Inc.

The regulation is unlawful because it does not give effect to the exemption for agriculture stormwater discharges as provided by Section 402 of the Clean Water Act.

(b) Response: Concentrated animal feeding operations are clearly considered point source discharges under the Clean Water Act. See response to comment # 42.

**(46) Subject: Stricter Than Federal Mandate - Unlawful Regulations**

(a) Comment: Judith A. Villines, Attorney, Tyson Foods, Inc.

Judith A. Villines, Attorney, Perdue Farms, Inc.

The proposed reg adopts a “substantial control” test for identifying operators who must apply for, and become liable for violating, a KPDES permit. The current federal regulations do not contain such a test, nor does the CWA.

(b) Response: The Cabinet has used its regulatory authority to set forth a “bright line test” to guide the parties as to when an integrator is deemed to have substantial operational control and is therefore considered an operator. EPA is in agreement with the Cabinet that existing federal regulations create liability on the part of the integrators who meet the test set forth in the proposed administrative regulation. See response to comment #33.

**(47) Subject: Stricter Than Federal Mandate - Unlawful Regulations**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

The new 2001 version of the emergency regulation is not substantially different from the expired regulation. The legislature has found the former proposed regulations to be deficient. Yet the Cabinet is issuing more emergency regulations that are more stringent than the federal regulations.

(b) Response: See responses to comment #s 29, 31, and 32.

**(48) Subject: Stricter Than Federal Mandate - Unlawful Regulations**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture

Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau

Judith A. Villines, Attorney, Tyson Foods, Inc.

Judith A. Villines, Attorney, Perdue Farms, Inc.

The US EPA has delegated the NPDES program to Kentucky. The Cabinet administers the program via the KPDES. The Cabinet now issues KPDES permits for point-source discharges. Federal regulations do not deem land application areas to be point sources thus any runoff could be considered a “non-point” source and not subject to KPDES permit requirements. The proposed reg attempts to regulate the land application of wastes from CAFO’s even though the application sites are not encompassed by the definition of a CAFO, and are not point sources that discharge pollutants.

The CWA only requires persons who are discharging or proposing to discharge pollutants to obtain an NPDES/KPDES permit. Moreover, the US Supreme Court has confirmed that persons who do not have control over a pollutant cannot be liable as an “operator”. U.S. v. Bestfoods, 118 S. Ct. 1876 (1998). The Clean Water Act unequivocally defines agricultural crop/pasture runoff as a non-point source of pollutants, and thus not subject to direct federal or federally delegated jurisdiction, 33 U.S.C. 1362(14)

(b) Response: Cultivated crop areas that are associated with Concentrated Animal Feeding Operations are considered point sources pursuant to 33 USC Section 1362. CAFOs are clearly defined in federal law as KPDES “point sources.” 33 U.S.C. Section 1362 defines “point source” as follows:

The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other

floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharge and returns flows for irrigated agriculture.

33 U.S.C. Section 1362(14).

A CAFO meets the definition of point source. Congress did not define “concentrated animal feeding operations”, but EPA has done so in the Code of Federal Regulations. Any operation that meets that definition is a “point source”. It thus becomes a facility or activity regulated by the CWA. EPA considers anyone who owns animals at a CAFO or provides operational direction at the CAFO to be the owner or operator of the CAFO.

In addition, see responses to comment #s 31, 32, and 46.

**(49) Subject: Related Legal Actions Against Regulations**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

Under the Federal Packers and Stockyard Act no livestock or poultry company can enter into any agreement that limits competition, and no state government can implement regulation that interferes with the Federal Packers and Stockyard Act. The proposed state regulation that requires the poultry company to be a co-permittee with a poultry grower seriously reduces a growers ability to negotiate contracts with competing poultry companies because of the joint permit. For a grower to switch companies they would require a new permit. This process will inhibit growers from seeking a new company to contract with, reducing competition for grower services. How can the Cabinet justify creating a state regulation that is in violation of federal law and mandates to a company that they enter into an agreement that is in direct violation of federal law?

(b) Response: This proposed administrative regulation is issued for the purpose of protecting the environment and does not violate federal law. A KPDES permit can quickly and easily be transferred to another entity with a change of ownership form. A new permit would not need to be issued, rather simply transferred to another party.

**(50) Subject: Related Legal Actions Supporting Regulations**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club

The industry continues to seek to deny the (existence of a) problem. Recently a group of Missouri residents, that were neighbors to the Premium Standard Farms, brought a class action nuisance suit against a facility that denied it was causing any problems. The jury awarded the neighbors residing within a 4-mile radius of that facility a verdict of \$5.2 million. However, many neighbors outside that radius were unhappy with that result because they were denied any recovery.

In NRDC v. Costle, 568 F.2d 1369 (D.C.Cir 1977), the United States Court of Appeals considered the challenge brought by NRDC against EPA regulations governing CAFOs. EPA argued that it was not required to regulate all CAFOs as point sources. It could not because there were too many. The District Court disagreed and the Court of Appeals affirmed, holding: "In sum" we conclude that existing uniform national effluent limitation is not a necessary precondition for incorporating into the NPDES program pollution from agricultural, silviculture and storm water runoff point sources." *Id.* at page 1379.

In Weber v. Trinity Meadows Raceway, 42 ERC 2063, 1996 WL 477049 (N.D. Tex.) the defendant was found to be a CAFO, and to have violated the Clean Water Act 23 times, facing

maximum penalties of \$575,000. The District Court found that \$10,000 per violation was appropriate, assessing a penalty of \$230,000.

Recently, the Georgia Supreme Court affirmed a trial court award of an injunction in favor of residential property owners to prohibit the construction of a proposed swine feeding operation for 22,800 hogs. These residents all *lived* within a one half mile radius of the facility. Superior Farm Management, LLC v. Montgomery, 513 S.W.2d 215 (Ga.S.Ct.1999) suggest(ed) that people living within half mile of a swine CAFO will be injured to justify a "nuisance per se" verdict. This finding supports (the need for) CAFO setbacks to prevent nuisance, and suggests that even in rural areas, a set back of 2,500 feet may be needed in some cases.

Last year, the State of Colorado sued one of that state's largest hog operations, National Hogs, for 42 clean water violations, seeking penalties of up to \$4.4 million. There are similar suits pending across the country in states where the responsible agency lacked the courage to see the problem coming and take steps to prevent it.

(b) Response: See response to comment #13.

**(51) Subject: Scope of Regulation**

(a) Comment: Danny Wilkinson, Farmer

(KPDES) Setback requirements should be based on water quality concerns, not air-quality and odor. Many odor-related complaints are caused by the structural facilities that we farmers are required to use to protect our water resources. These problems are few and rarely pose lasting complaints or health concerns.

(b) Response: The Cabinet has determined that both water and air quality issues need to be addressed in this proposed CAFO administrative regulation. The Cabinet is unaware of structural facilities designed to protect water resources that cause odor problems.

**(52) Subject: Scope of Regulation**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau

The regulation goes far beyond the KPDES goal of water quality protection because it includes air quality considerations. Air quality and odor need to be addressed, but not under the guise of water quality regulations.

(b) Response: See response to comment # 39.

**(53) Subject: Applicability**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

What process does the Division use to determine the number of units at a facility? Is it reliance on the number of birds called for by the contract between the farmer and the processing facility?

(b) Response: As is the case with all KPDES permits, the Division relies upon information contained within the permit application. Therefore, we will use the application to determine the number and type of animals. With respect to this specific question, the number of birds expressed in a contract between the farmer and the processing facility will provide a good basis for making that determination.

**(54) Subject: Applicability**

(a) Comment: Dennis Liptrap, Hubbard Feeds

Does the old KNDOP permit meet the present standards for a federal NPDES permit? If yes, why are you proposing more stringent regulations so far ahead of finalized federal guidelines?

(b) Response: No, the current “no discharge” permit program as implemented under 401 KAR 5:005 is not equivalent to KPDES program standards. As a result, the Cabinet has proposed to use the federal NPDES permit (or an equivalent) as required by EPA. The proposed administrative regulation is not more stringent than the federal regulations. See response to comments #s 10, 31, and 32.

**(55) Subject: Agriculture Water Quality Plan and Best Management Practices (BMPs)**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture  
Carole Knoblett, Kentucky Poultry Federation

Most farmers use proper procedures for land application. Why haven’t the water quality BMPs 11 and 17 been given an opportunity to work when this process will affect the so-called bad actors? Permits and regulations are not needed if Farmers are being conscientious neighbors. The Agriculture Water Quality Plan is in place to support agriculture and protect the environment. What scientific basis exists demonstrating that something more than BMP 17 is needed in addressing environmental issues at poultry farms?

(b) Response: The BMPs required under the Agriculture Water Quality Plan will be given the opportunity to work. However, the Agriculture Water Quality Act, KRS Subchapter 224.71 is a state statute pursuant to state only authority and not pursuant to the Clean Water Act. Independent of that statute, the Cabinet has responsibility pursuant to KRS 224.16-050(1) to administer the provisions of the Clean Water Act 33 U.S.C. 1251, *et seq.* The Agriculture Water Quality Act is not stringent enough to meet the requirements of the federal Clean Water Act. It does not, for example, govern the issuance of NPDES permits required by the Clean Water Act. Thus relying on it alone would violate the provisions of the Clean Water Act found in 33 U.S.C. 1370.

**(56) Subject: Agriculture Water Quality Plan**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council

The development or upgrading of a comprehensive nutrient management plan needs to be one of the first things that is considered for those that do have the Agriculture Water Quality Plans in place.

(b) Response: The Cabinet agrees with this comment. The agency anticipates significant delays in producers being able to locate and retain qualified assistance in the preparation of the CNMPs. Therefore, while requiring the basic Agricultural BMP plan right away (to provide a continuing level of protection), a delayed requirement for the CNMPs was considered necessary.

**(57) Subject: Agriculture Water Quality Plan**

(a) Comment: Dennis Liptrap, Hubbard Feeds

Carole Knoblett, Kentucky Poultry Federation

Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau

The agriculture community has worked diligently with the Cabinet on the Agriculture Water Quality Plan and educated farmers about environmental responsibility and BMPs without recognition from the Executive Branch. Allow the Agriculture Water Plan an opportunity to work. Allow the Agriculture Water Quality Authority input into flexible, common sense

regulations that protect the water and the livestock industry. Enforce current regulations.

(b) Response: The Agriculture Water Quality Plan will be allowed to work, will be enforced, and is recognized as a valuable means of protecting the water quality. The Agriculture Water Quality Plan is an important step toward clean water in the state, however, it does not implement the Clean Water Act. Given that the CAFO definitions reside within federal NPDES regulations, EPA has directed delegated states to use their NPDES programs to regulate CAFO's.

**(58) Subject: Agriculture Water Quality Plan**

(a) Comment: Aloma Dew, Sierra Club

We cannot wait until October 2003 when the Ag Water Quality rules go into effect. These rules are at best suggestions with no real enforcement.

(b) Response: The Cabinet notes the comment. The Agriculture Water Quality Plan requirements are enforceable. It should be noted that the Agriculture Water Quality Plan requirements go into effect in October 2001, not 2003.

**(59) Subject: Agriculture Water Quality Authority**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
We strongly object to the Cabinet's establishing siting criteria and setbacks without formally requesting input from the expertise and the experience of the Agriculture Water Quality Authority. Deciding where farming operations can build or expand facilities and apply manure without input from the agriculture community could force livestock and poultry farmers out of business. The Cabinet has incorporated nearly all of the Authority's setbacks for poultry in the proposed regulations.

(b) Response: The Cabinet has sought the input of the Agriculture Water Quality Authority, commodity groups, extension, farmers, and numerous other individuals throughout the course of this process of addressing animal feeding operations. Setback requirements in the proposed administrative regulation are based on the considerable background of knowledge accumulated by the Cabinet to date.

**(60) Subject: Agriculture Water Quality Authority**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club

The Kentucky Agriculture Water Quality Act could have anticipated the need for industrial type water quality requirements but did not. The Kentucky Agriculture Water Quality Authority has shown that it lacks the will or the ability to address these problems.

(b) Response: See response to comment # 13.

**(61) Subject: Over-regulation of Farmers**

(a) Comment: Danny Wilkinson, Farmer

With the provision that at the discretion of the Cabinet any farm could be designated as a CAFO, the ability of my farm to survive to a seventh generation is in doubt.

(b) Response: The provision allowing an operation to be designated as a CAFO is not a provision of the proposed administrative regulation. Rather, it is a provision of other KPDES regulations that have been in effect for years.



**(62) Subject: Over-regulation of Farmers**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture

The livestock industry accounts for over half of the four billion dollars in income in our state and offers the opportunity for diversification at a time when, especially small farmers, who have depended on tobacco need it. Increased regulations take away that opportunity. A farmer recently said that he can't make a multi-million dollar expansion when complying with regulation is like shooting at a moving target. The current Kentucky regulatory programs are sufficient to address the concerns for environmental protection.

(b) Response: The Cabinet recognizes the importance of the livestock industry to the economy of the Commonwealth. However, the importance of protecting and conserving Kentucky's environment is equally important to the citizens of the state. EPA expects each delegated state to use their NPDES programs to regulate CAFOs (existing federal regulations mandate NPDES permits for CAFOs). The Cabinet will strive as much as possible to prevent duplication of effort and will attempt to integrate the issuance of KPDES permits into an overall animal waste strategy.

**(63) Subject: Enforce Current Regulations**

(a) Comment: Bill Payne, Dairy Producer, KY Milk Producers Association

If we have a problem, there are regulations in effect that need to be enforced.

(b) Response: See response to comment # 62.

**(64) Subject: Siting Criteria – Too Restrictive**

(a) Comment: Jerry Lock, Grower

Setbacks are too stringent. These requirements will result in very few conforming (poultry) sites.

(b) Response: The proposed setbacks are the result of an evolving process that the Cabinet has undertaken since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(65) Subject: Siting Criteria – Too Restrictive**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau

Because of setback requirements a majority of Kentucky's existing CAFOs can not expand their operations and most poultry producers will be unable to build permanent litter storage. The regulations will not allow some farmers to build chicken barns and will leave them to pay for land out of pocket.

(b) Response: Existing operations can expand provided they comply with respective permitting requirements and siting criteria, including setbacks. Existing permanent litter storage structures are exempted from the new siting requirements.

**(66) Subject: Siting Criteria – Too Restrictive**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture

Billy Cochran, KY Pork Producers

What is the justification for the setback distances? Some of the setbacks are too extreme. After four years, only a handful of citations have been issued statewide and there is virtually no history of violations of the environmental performance standards. The setbacks appear to be arbitrary and

do not consider the BMPs that now exist or may be developed. Setbacks are excessive for some parameters.

There are (also) inconsistencies in the siting criteria and setbacks among the species covered in the proposed regulation. What is the justification for these differences?

(b) Response: The proposed setbacks are the result of evolving process that the Cabinet has undergone since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time. The poultry setbacks, for example, are based substantially on BMP #17 from the Agriculture Water Quality Plan. One notable exception is dwellings. Any future BMPs developed will be evaluated at that time.

With respect to the lack of citations issued by the Cabinet statewide on setbacks, that would be expected. During the period in which the swine feeding regulation (401 KAR 5:009) was in effect, no operation was ever permitted under that program. As a result, no setback violations occurred under that program. It should be noted however, that the Cabinet has identified numerous instances in the past where animal feeding operations were violating permit requirements or other state regulations.

**(67) Subject: Siting Criteria – Too Restrictive**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture  
A facility would need to be in the center of a six-tenths mile diameter circle to meet those (setback) requirements. This constitutes land use zoning, with or without local ordinances.

(b) Response: The distance figure would be accurate if one assumes that adjacent dwellings surround a given CAFO on all sides, and that all dwellings are located precisely on the property line. If those assumptions were the situation, then in order to meet a dwelling setback of 1500 feet, a farm would need to be approximately 162 acres in size if in the shape of a circle, or approximately 206 acres if in the shape of a square. On the other hand, if neighboring dwellings are not located directly on the property line as would be expected, then substantially less acreage could potentially be suitable. As a note, the average farm size in Kentucky as per statistics made available by the Kentucky Agricultural Statistics Service is 151 acres (90,000 farms). This would suggest that numerous farms in Kentucky could be suitable for a CAFO operation under the proposed administrative regulation.

In addition to the above, another factor to consider when evaluating environmental concerns as it relates to farm size is the ability to utilize the manure produced. For a poultry CAFO for example, with 100,000 broilers, some 600 tons/year of litter would be generated. A farm of 162 or 206 acres, as mentioned previously, would likely not be sufficient to utilize this volume of annual litter generation as a fertilizer due to both agronomic and environmental concerns. In these instances, litter would need to be sent off-site in order to handle it properly, which is a common practice in Kentucky with existing large poultry producers. While this proposed administrative regulation only addresses CAFOs, these off-site locations also have similar environmental concerns as the CAFOs that produce the manure. This is noted to simply illustrate some of the environmental challenges in dealing with large animal feeding operations.

Farm size was addressed in BMP # 17 of the Agriculture Water Quality Plan, for instance, which requires that a minimum of 15 acres be present for 1 or 2 poultry houses, with an additional 5 acres for each additional house. This would indicate that 25 acres is suitable for a 4 house poultry operation confining approximately 100,000 broilers, with the poultry houses themselves comprising 2 to 5 acres of the operation. However, the Cabinet has concerns as to whether this

amount of acreage is sufficient to address environmental concerns relating to a CAFO. These concerns are further compounded when multiple operations of similar size are located in the same general area.

With these, and other considerations taken into account, the Cabinet used all available resources to determine what setback distances would be reasonable to protect both human health and the environment.

**(68) Subject: Siting Criteria – Too Restrictive**

(a) Comment: Bill Payne, Dairy Producer, KY Milk Producers Association

Very few sites will conform when siting a new barn or operation. The land application area setbacks that pertain to property lines, roadways, and dwellings have no bearing on water quality. Setbacks have nothing to do with water quality except for blue line streams, wells, sink holes, and topography. Due to manure application setbacks farmers can not keep applications as thin as they ought to.

(b) Response: Setbacks to roads, schools, churches, and other buildings are not established for the protection of water quality. Rather, they are established for the protection of human health and the environment as it relates to odor, air toxics, pathogens, and other concerns. With respect to property lines, the proposed administrative regulation does not address property lines. The Agriculture Water Quality Plan does however establish setbacks for property lines. The Agriculture Water Quality Plan similarly addresses dwellings, churches, etc.

As to manure application, a CAFO will have to develop a CNMP to address land application of waste nutrients. The amount of manure land applied to particular soils, crops or pastureland is unaffected by the imposition of setbacks. The amount of land necessary to land apply, on the other hand, may be affected. A CAFO will be required to address both the agronomic and environmental aspects of land application of waste nutrients, in addition to ensuring sufficient land for use or alternative handling means.

**(69) Subject: Siting Criteria – Too Restrictive**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
Establish setbacks for land application that are realistic and consistent for all CAFOs.

(b) Response: The proposed setbacks are the result of an evolving process that the Cabinet has undertaken since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

The poultry setbacks were primarily based on the Agriculture Water Quality Plan BMP #17. Similar setback BMPs for swine, beef, or dairy did not exist. In addition, the dry nature of poultry litter (provided it is kept dry), lends itself to less odor than does wet manure, which is typically the case with swine, dairy and some beef operations.

**(70) Subject: Siting Criteria – Too Restrictive**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

Existing farms that do not meet the new siting guidelines cannot build a litter storage shed. How does the Cabinet plan to address this issue that has an immediate impact on existing farms? Does the siting criteria apply to all new or expanded barns and lagoons owned or operated by the permittee or on the land where the CAFO is located even though they are not used in connection with the CAFO?

(b) Response: See response to comment #65. The proposed administrative regulation only applies to structures and activities on operations defined as CAFOs. Any barn, lagoon, poultry house, litter storage structure, composting site, or waste handling structure directly associated with the confinement of animals, that is located on the farm defined as a CAFO, would be affected. Other structures, activities, or land, not owned or carried out by the permittee which are not located on the same farm as the CAFO, would not be affected by this proposed administrative regulation.

**(71) Subject: Siting Criteria - Unjustified**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

During the June 1999 comment period on the Groundwater Protection Plan for Poultry Facilities on less than ten acres, the Cabinet responded to comments by stating that setbacks to roads, schools, and churches do not relate to the protection of groundwater. How do setbacks to roads, schools, churches, and other buildings protect the waters of Kentucky now when they could not in June 1999?

(b) Response: Setbacks to roads, schools, churches, and other buildings are not established for the protection of water quality. Rather, they are established for the protection of human health and the environment as it relates to odor, air toxics, pathogens, and other concerns.

The Cabinet would note that setbacks for these same features are established by the Agriculture Water Quality Plan BMP # 17 for poultry operations. The Kentucky Poultry Federation expressed support of the Agriculture Water Quality Plan in its comments made during the public hearing. The Cabinet used these established setbacks as the basis for the majority of the proposed setbacks for poultry CAFOs.

**(72) Subject: Siting Criteria – Karst Protection**

(a) Comment: Aloma Dew, Sierra Club

Siting criteria are inadequate. It does absolutely no good to have siting standards, if they are not uniformly used and enforced. Because of Kentucky's unique and delicate geology, geography and waterways, it is imperative that setbacks be stronger in karst areas and areas likely to flood.

(b) Response: Setbacks from "karst features" for both physical structures and land application areas have been proposed. The Cabinet concurs that any regulatory requirement must be enforced uniformly.

**(73) Subject: Siting Criteria – Karst Protection**

(a) Comment: Teena Halbig, FFEA

FFEA asks that more regulations be written to address (siting of CAFOs) in karst terrain. 50% of our state is karst. In such areas groundwater (and pollutants) can travel underground for many miles (to users). Delineate areas more hazardous (karstic) for siting CAFOs. Just to have a setback is inadequate.

Under Section 3 "Best Management Practices", part 2(c) discusses siting restrictions near "a sinkhole or other enclosed depression where subsidence is evident". The period needs to end after "sinkhole", and another sentence (is needed) to address sinks, depressions or closed-throat sinkholes. Your regulation should not solely address subsidence, rather you need to address groundwater and water quality.

Swine siting criteria in part 4(a) need to be revised. Litter storage should not be allowed

in karst areas – much like septic tanks. Litter storage should be sited on 5 to 10 acres for 1 house in karst areas.

Land application may not be appropriate in karst areas. Mapping must be done. Lexington has excelled in mapping their caves and sinkholes. We must expand this coverage statewide.

(b) Response: Setbacks from "karst features" for both physical structures and land application areas have been proposed.

**(74) Subject: Siting Criteria – Karst Protection**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
Susan Crosswait, Kentuckians for the Commonwealth

DRC supports setbacks for karst features that are equal to that of water wells because of the nature of karst areas. We also support the Western Kentucky residents who have called for and provided written examples of setbacks to Dwellings, Lakes, Streams or Rivers, and Property lines. DRC urges the Division to retain the five-mile setback distance from a public water supply. In addition, the five-mile setback should be extended to land application areas of large-scale confined swine feeding facilities. Kentucky has many small, under-funded drinking water plants that lack the capacity to detect and treat disease organisms like cryptosporidium that can be present in hog waste.

(b) Response: See response to comments # 72. The Cabinet has proposed siting criteria relative to public water supplies.

**(75) Subject: Siting Criteria – Inadequate**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council

Setbacks are inadequate to fulfill the requirements of the KPDES program and assure protection of public health and welfare. The failure to require CAFOs to fully internalize and prevent air, water and land pollution amounts to an improper subsidy of an animal management approach whose environmental costs are borne by those downhill, downwind and downstream.

(b) Response: The proposed setbacks are the result of an evolving process that the Cabinet has undertaken since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(76) Subject: Siting Criteria – Inadequate**

(a) Comment: Barbara Edwards Thomas, Citizen  
Brenis Miller, Citizen  
Linda Dempsey, Citizen

We need stronger regulations and stronger setbacks. They also need to be enforced. very concerned about how loosely, if at all, the regulations are followed concerning chicken houses. Please keep the regulations in-place so we will at least get a chance to enforce them.

(b) Response: See response to comment # 13.

**(77) Subject: Siting Criteria – Inadequate**

(a) Comment: Barbara Edwards Thomas, Citizen  
Charles Bates, Citizen

I (We) need regulation (setbacks) on the current (chicken) factory farms near my home. Make

regulations that decrease odor. Make them put up tree barriers (and) put an air filtering system on the chicken house fans.

(b) Response: See response to comments # 13.

**(78) Subject: Siting Criteria – Inadequate**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council

The use of setbacks as a surrogate to proper management of odors, airborne toxics, disease-causing organisms and other air contaminants is inappropriate. Setbacks should be required under the KPDES and water quality authority to assure prevention of water pollution and under 401 KAR Chapters 30, 45, and 47 to minimize nuisances, by providing geographic isolation of facilities and their inherent odors and vectors. Setbacks should not be considered a sufficient stand-alone pollution control strategy; there should be a general prohibition of nuisance or water pollution. The National Pork Producer's Association recommends new hog operations be located 1,500 feet from houses and 2,500 feet from schools, hospitals and churches. Research and anecdotal evidence suggests that odors are a problem at far greater distances. More restrictive setbacks have been adopted by other states and localities. The Council also recommends that the Cabinet consider allowing a variance from the setbacks for demonstrated methods of management that result in no nuisance condition or water pollution, and that the Cabinet differentiate in setback requirements between land application by spray irrigation, wet management by incorporation, and dry waste management.

Any setbacks which are directed at preventing nuisance must be crafted so as to fully protect the use and enjoyment of other properties. Assume the most sensitive land uses for adjoining lands and establish setbacks based on the existence of the sensitive land uses at the property boundary.

Appropriate setbacks need to apply to all activities (including land application) conducted after the enactment of the regulations, because there is no pre-existing right to cause water pollution or a nuisance.

(b) Response: The proposed setbacks are the result of an evolving process that the Cabinet has undertaken since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time. The regulations do differentiate between setbacks for land application depending upon whether waste is either land applied or injected. The Cabinet had previously considered variances from setbacks for alternative technologies in previous regulation development processes but has chosen not to pursue that option at this time.

With regard to nuisance matters, the Cabinet is not proposing to address this. Nuisance is better addressed at the local level via planning and zoning and/or nuisance ordinances. Neighbors have common law rights concerning nuisance that can also be addressed in the courts.

**(79) Subject: Siting Criteria – Inadequate**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

Wade H. Helm, Kentucky Conservation Committee

In the emergency regulation, inadequate setbacks provide the only protections from disease and odor for neighbors and downwind/downstream communities. Neighbors and those living downstream must be protected from the presence of disease organisms, including bacteria, viruses

and parasites in hog and poultry waste from these concentrated feeding operations.

In the absence of a program for air monitoring and a more substantial set of protections from odor, more protective setbacks are required. Therefore, the DRC calls for a 5,000-foot setback for barns, lagoons, and land application (other than injection) from dwellings, city limits and public places. As long as setbacks are the key protection offered for odor and diseases, they must be adequate to ensure that neighbors' health is protected. We support the setbacks in the emergency regulation, with the exception of; the setbacks for dwellings, water wells, karst features, and lakes, rivers and streams, which we believe should be more protective, and the lack of a setback for property lines.

(b) Response: See response to comment #66.

**(80) Subject: Siting Criteria – Inadequate**

(a) Comment: Sue Anne Salmon, Citizen

The regulations need stronger siting requirements. We need setbacks increased to at least three miles, between a hog barn, or a lagoon with 500 or more animal units, and a dwelling, church, cemetery or school. Need at least 3,000 feet between a poultry CAFO and a dwelling, church, cemetery or school. Need at least 750 feet between a neighboring property line and a CAFO. These setbacks should include areas of land application of manure. There should be a setback of at least one-mile between poultry barns at different operations.

(b) Response: See response to comment #66.

**(81) Subject: Siting Criteria – Inadequate**

(a) Comment: Susan Crosswait, Kentuckians for the Commonwealth

Setbacks are not strong enough. They would be more reasonable if the animal units used to define a CAFO were lowered to 500 from 1,000. Facilities with 1,000 animal units should have twice the (proposed) distance for setbacks from dwellings, schools, churches, etc. Also consider setbacks of 750 feet from a property line of all CAFOs. Landowners are limited to what they can do with property so close to CAFOs.

(b) Response: See response to comment #66.

**(82) Subject: Siting Criteria – Inadequate**

(a) Comment: Patty Wilson, Citizen

Stronger setback requirements are needed. The emergency regulation fails to provide a combination of setback and technological controls needed to fully protect air and water quality from degradation. The setback requirements fail to protect the rights of downhill, downwind and downstream landowners from odors, phosphorus and nitrogen pollution, and nuisances.

(b) Response: See response to comment #66.

**(83) Subject: Siting Criteria – Inadequate**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club  
Aloma Dew, Sierra Club  
Brenis Miller, Citizen  
Barbara Edwards Thomas, Citizen

(5:074E) "Best Management Practices" contain setback requirements. These setback requirements are no more protective than the siting requirement contained in 401 KAR 5:072.

Sierra Club had filed suit against the Cabinet complaining that the Cabinet is required by KRS 224.10-110 and KRS 224.20-110 to establish best management practices and other regulatory requirements that are effective to protect people from air pollution, including odor. The Emergency Regulations are not protective enough and the Final Regulations must be more protective, based on the duty that the General Assembly has imposed on the Cabinet.

The Cabinet has had setback requirements for swine feeding facilities since 1998. The Kentucky Agriculture Water Quality Authority has had weak setback requirements since 1999. The regulations should require that all CAFO facilities shall meet reasonable setback requirements from other properties and from water resources, and that those facilities that are constructed in violation of reasonable setback requirements shall be phased out of operation based on considerations of severity of harm and risk.

The Sierra Club strongly supports the requirement that all land application of waste at a CAFO shall comply with setback requirements, and urges the Cabinet to adopt setback requirements that will provide more effective protection to adjoining property owners than the distances set forth in the proposed regulation. A setback of 1,500 feet from lagoon or poultry house to dwelling, school, schoolyard, business, church or park is clearly not adequate to protect these uses from the adverse impacts of CAFOs. The Sierra Club continue(s) to ask that a setback of at least 750 feet to the property line of another owner be included in the regulations. We are still opposed to the reduced setback requirements for poultry facilities to city limits, public water supplies and secondary roads. Poultry facilities are causing the most serious problems in Kentucky today.

(b) Response: See response to comments #66. In addition, the Cabinet would note that the Kentucky Agriculture Water Quality Authority setbacks established for poultry operations in 1999 do not go into effect until October, 2001.

**(84) Subject: Siting Criteria – Inadequate**

(a) Comment: Corrine Whitehead, Coalition for Health Concern

Setbacks of one (1) mile from a hog house or a lagoon (servicing more than 1,000 units) to a dwelling, church, public cemetery, or school are needed.

(b) Response: See response to comment #66.

**(85) Subject: Siting Criteria – Inadequate**

(a) Comment: Hunter and Vera Roberts, Citizens

Victor Kennedy, Citizen

Corrine Whitehead, Coalition for Health Concern

Bernadine Edwards, Citizen

Siting criteria is not adequate to protect neighbors from the odor, flies, dust, and rodents from these operations. The setbacks are not sufficient for the neighbors who live next to them (chicken houses). If you look at the fans on all these chicken houses you can see what is being blown out into the air we breath. The fans are full of dust and feathers.

Poultry siting requirements, as a minimum, should require setbacks of 3,000 feet from a dwelling, church or public cemetery and a minimum of 750 feet to a property line not owned by the grower. Poultry barns should not be built within two (2) miles of existing poultry barns, as measured from the closest point of barn to barn.

Swine barns should be at least one mile from a dwelling, church or school; and (both)



swine and poultry barns should be 3,000 feet from a river, well, or water source.

(b) Response: See responses to comment #s 66, and 67. With regard to mice or other rodent infestation problems, individuals should contact the Department of Agriculture, Division of Pests and Weeds (502-575-7162). For health concerns related to mice or other rodents, individuals should contact the Cabinet for Health Services, Department for Public Health (502-564-4856), or the local health department in their area. The proposed administrative regulation is designed to address odor concerns via siting criteria, including setbacks.

**(86) Subject: Siting Criteria – Inadequate**

(a) Comment: Sue Anne Salmon, Citizen  
Susan Crosswait, KTFC

Why are setbacks from privately owned water sources such as private wells less than those protecting public water supplies? Rural residents should be afforded the same protections from bad neighbors as city dwellers.

(b) Response: The Cabinet distinguished between water wells and public water supply surface intakes due to the differences in which pollutant transport generally occurs with those respective features. This should not be viewed as a differing level of protection for either rural or urban residents. Rather, the Cabinet intends to afford equal protection among all residents within the Commonwealth.

**(87) Subject: Siting Criteria – Inadequate**

(a) Comment: Joe Knoepfler, Citizen

In Cumberland County our local government enacted an ordinance including set-backs greater than those called for by the state regs. Despite those regulations, local government receives complaints regarding flies and stench and partially composted chickens parts spread with the litter. I therefore believe that since our more stringent Cumberland County rules are failing to satisfy the reasonable expectations of my neighbors – and I want it understood that we’re not talking about folks who just moved to the country – the state regulations need stiffening.

(b) Response: The proposed administrative regulation does not prohibit local governments from establishing more stringent local requirements or ordinances. See also responses to comment #s 66, 67, and 85.

**(88) Subject: Siting Criteria – Inadequate**

(a) Comment: Susan Crosswait, Kentuckians for the Commonwealth

Consider tiering setbacks.

(b) Response: The Cabinet has considered tiering of setbacks. Looking at the entire livestock and poultry industry in Kentucky, siting criteria does in fact exist at tiered levels already. For all operations greater than 10 acres in size, the requirements (including setbacks) of the Agriculture Water Quality Plan will apply as of October 2001. For operations that are defined as CAFOs, or generally the largest operations, then the requirements (including setbacks) of the proposed administrative regulation would apply. The Cabinet does not propose a distinction between CAFOs of varying size in this proposed administrative regulation.

**(89) Subject: Siting Criteria – Exceptions**

(a) Comment: Michael Hancock, KY Transportation Cabinet

Consider providing an exception to the setback restriction when; a state or federal road is constructed or re-constructed by the Transportation Cabinet that brings the road within the minimum setback requirements of an existing permit holder.

Also, Consider providing an exception to enforcement of the setback restriction against a permittee when; a state or federal road is constructed or re-constructed after a permit has been issued or an application filed.

(b) Response: A footnote has been placed in the siting criteria tables in the proposed administrative regulation to address this concern.

**(90) Subject: Additional Regulatory Requirements – Density**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
Aloma Dew, Sierra Club

We encourage the Cabinet to drop the number of animal units at which regulations come into effect, from 1,000 to 500 (from 100,000 chickens to 50,000), or use a tiered system that would provide some regulations for operations with 500- 1,000 animal units. This is because there are problems stemming from these smaller, yet still industrial operations. It seems as if some mechanism is needed to curb the harmful effects that these smaller industrial operations can sometimes cause. This would be in compliance with the recommendations in the Federal EPA CAFO proposed regulations.

(Also) placing 90,000+ chickens in many houses on adjacent properties, and under different owner's names, avoids the regulations but does nothing to improve conditions. We encourage the closing of these and other loopholes being used to avoid regulation.

(b) Response: The number of units is consistent with current federal regulation. Other KPDES regulations govern the ownership of adjacent operations.

**(91) Subject: Additional Regulatory Requirements – Density**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
Susan Crosswait, Kentuckians for the Commonwealth

The Division noted previously that the regulation did not contain density requirements, but that siting requirements would indirectly control density. However, DRC, CFA members, KFTC members, and others continue to support density limitations on poultry houses. Several counties have already put into place limitations on poultry houses, and one such local ordinance has withstood one court challenge. The Allen County ordinance says that poultry operations must be 15 acres in size and are limited to a total of 5 barns per farm, with each barn limited to 8,000 chickens. Monroe County's ordinance limits poultry operations to 8 barns on a minimum of 15 acres with a limit of 25,000 chickens per barn. Cumberland County's ordinance limits operations to not more than 2 poultry barns per farm with each barn limited to 23,000 chickens. We urge the Cabinet to examine the impact of concentrations of poultry houses on air and water quality within the region and devise a permanent regulation to protect the public and environment from those effects.

(b) Response: The Cabinet has chosen not to address density of animals allowed. The agency would note that handling of manure in an appropriate manner, both from an agronomic and environmental perspective, will address animal density concerns in many respects. Further, the setbacks help address the density issue.

With respect to cumulative impact of poultry houses, the Kentucky Watershed

Management Framework is designed to account for these types of concerns and issues. This would include, for example, the Total Maximum Daily Load (TMDL) program administered by the DOW.

Finally, the proposed administrative regulation in no way prohibits local government to establish their own local ordinances and criteria for the siting and operation of animal feeding operations.

**(92) Subject: Additional Regulatory Requirements – Density**

(a) Comment: Sue Anne Salmon, Citizen  
Hunter and Vera Roberts, Citizens  
Victor Kennedy, Citizen  
Karol Welch, Magistrate, Hopkins County

Density limitations for poultry operations with 500 or more animal units should be limited to no more than four poultry barns per 15-acres of property. Each poultry barn should be limited to 25,000 chickens or 13,000 turkeys.

Limit the number of chicken houses built in rural areas (there are 142 chicken houses in the Beech Grove/Elba area).

(b) Response: See response to comment #91.

**(93) Subject: Additional Regulatory Requirements – Density**

(a) Comment: Corrine Whitehead, Coalition for Health Concern

There should be no more than four (4) poultry barns per fifteen (15) acres of property.

(b) Response: See response to comment #91.

**(94) Subject: Additional Regulatory Requirements – Density**

(a) Comment: Wade H. Helm, Kentucky Conservation Committee

The Cabinet should limit the density of CAFOs, if it is not serious about setbacks. (Require) individual permits for 100 animal units, not 1,000 animal units. Neighbors have testified that one chicken house with 20,000+ chickens, or one hog lagoon can ruin property for miles around.

(b) Response: See response to comment #91.

**(95) Subject: Additional Regulatory Requirements – Groundwater**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

Hog lagoons can and often do contaminate groundwater with nitrates. Nitrates can cause blue-baby syndrome, if they are present in the drinking water of expectant mothers. DRC urges that an adequate groundwater monitoring system be required for the purpose of detecting seepage from hog waste lagoons. Quarterly monitoring for at least two years should be required to establish baseline background levels.

DRC urges that up gradient wells be sited in such a way as to determine background unaffected by hog waste management activities (including land application) at the facility. A narrative standard should require a minimum of three down gradient wells to ensure detection of a potential plume of groundwater contamination. DRC also support at a minimum, the parameters, including bacterial contamination included in the Cabinet's set of swine feeding operation regulations promulgated several years ago. Based on soil types and hydrogeologic considerations, the Cabinet should also require monitoring for potential groundwater contamination from land

application areas.

All results of groundwater testing should be submitted to the Cabinet to ensure that neighbors have access to information about levels of contaminants in groundwater. Even if the background well is the most contaminated, neighbors should have access to this information so that private wells could be tested and drinking water replaced, in light of the health effects of nitrate in water.

(b) Response: The Cabinet has chosen not to require groundwater monitoring as a part of this proposed administrative regulation. Any determination to require such would occur during the actual permitting of the operation.

**(96) Subject: Additional Regulatory Requirements – Groundwater**

(a) Comment: Corrine Whitehead, Coalition for Health Concern

Sue Anne Salmon, Citizen

Karol Welch, Magistrate, Hopkins County

Susan Crosswait, Kentuckians for the Commonwealth

More stringent waste disposal regulations are needed. Require groundwater monitoring (with verifications by State personnel) around hog lagoons. Please require that all test results (water and soil) be kept in Frankfort, as well as on the farm.

(b) Response: See responses to comments #s 91 and 95. The permit holder is required to submit a Comprehensive Nutrient Management Plan to the Cabinet, which addresses a number of testing requirements. In the event of a discharge, the operation must monitor the discharge and report the results to the Cabinet within 30 days. All other data must be maintained onsite and made available to a Cabinet representative upon request.

**(97) Subject: Additional Regulatory Requirements – Groundwater**

(a) Comment: Teena Halbig, FFEA

More regulations are needed to address geology and hydrology. Companies who choose to site should have to have (submit) geo-technical analyses and dye tracing. We prefer that the state also look at the geo-tech information provided by the company to help protect all people's health and welfare.

The State should provide (require) testing of water supplies within ten miles of CAFO sites. Testing should be done prior to plant openings and periodically thereafter. (Affected) residents should also be notified (in advance of testing).

In Louisville, the MSD has learned to buffer their plants. Your regulations may need to be updated to protect the public from odors (with buffer zones).

(b) Response: The proposed administrative regulation is the result of an evolving process that the Cabinet has undertaken since early 1997. The proposed administrative regulation represents the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time. The siting requirements are a type of buffer zone.

**(98) Subject: Additional Regulatory Requirements – Disclosure**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council

Aloma Dew, Sierra Club

The regulations should also include provisions regarding neighbor and public notice, disclosure of compliance history of all owners and controllers, and financial assurance that some funds will be

set aside to assure proper closure of the facility and clean-up of any spill or release. There should also be a requirement for maintaining liability insurance to pay any judgments or claims from third parties that a nuisance has been created by the facility, and to pay any third party injury claims or loss of property value.

Appropriate reporting obligations should be imposed as will enable the agency to properly monitor implementation of the law and identify areas of concern. Immediate reporting of any releases, spills, leaks or groundwater contamination should be required. Density controls are needed for the number of animal units in a given area. Zones of use are needed for nutrient laden waters or litter so that the nutrients would be locally produced and locally used. Riparian buffer zones such as constructed wetlands are needed. Redundant nutrient barriers and linings should be required, especially in Karst areas.

(b) Response: The existing KPDES regulations already address public notice and compliance matters. The integrator liability provision addresses how the producer and the processing facility are responsible for complying with environmental requirements related to the KPDES permit. With respect to liability insurance, the proposed administrative regulation does not propose to address that issue. Monitoring and reporting will be a condition of any KPDES permit issued. The proposed administrative regulation does address buffer zones for sensitive environmental features.

With respect to density controls, please see response to comment # 91.

**(99) Subject: Additional Regulatory Requirements – Disclosure**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

The Cabinet should consider requiring a report of any disease outbreak among the swine and should have the ability to require monitoring of waste for pathogens in such a case, as well as a plan for treatment to destroy pathogens prior to land application or increased setbacks, as necessary.

DRC urges the Cabinet to reconsider imposing the original provisions from the 1997 emergency regulations regarding relatedness, especially with regard to corporate farms and common investors, as well as common land application areas. In addition, permitting needs to take into account the prior past performance (and any current violations) of applicants.

(b) Response: The Cabinet does not regulate the problem of livestock disease. The KPDES permitting process does take into consideration past performance and relatedness.

**(100) Subject: Additional Regulatory Requirements- Land Application**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club

It is generally recognized that broiler houses will generate about 200 tons of litter per year per house. Multiply that number times 2000 houses and we have a massive waste disposal, air pollution and water pollution problem in this state. USDA NRCS published revised conservation practices to address the growing concern about phosphorous (in) 66 Federal Register, Number 3, January 4, 2001. That guide appears to authorize manure application up to a limit of 20 tons/acre/year. However the EPA proposed rule published on January 12, 2001 states that the phosphorous content of litter from broilers means that 2.23 tons of chicken litter per acre per year will supply all the phosphorous needed for a typical acre of crops. At the Kentucky Water Resources Symposium earlier this year, research done at UK appears to document that the application of chicken litter at the rate of 1 ton/ per acre would cause an increase of fecal coliform

in one hour 28 inches below the surface. Where there is such wide variation about the water quality consequences from application of chicken litter, the Cabinet must include the land application (restrictions) of litter within the KPDES permitting requirements and must set BMPs that are protective of the environment.

(b) Response: The Cabinet is aware of the ongoing process involving the establishment of NRCS Practice Code 590, for Nutrient Management. The Cabinet has commented on the proposed 590, expressing concern over both the short and long term impacts of improper land application of animal waste. The Cabinet is relying upon NRCS to provide a 590 standard that will be protective of the waters of the Commonwealth, and has incorporated that standard into the NPDES permitting process (CNMP requirements). In addition, the 590 standard forms the basis for the Agriculture Water Quality Plan BMPs, for nutrient management.

**(101) Subject: Additional Regulatory Requirements- Land Applications**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
DRC supports requirements that would not allow waste to be land applied on frozen or saturated soil, during a precipitation event, or in excess of the amount needed to provide the nitrogen requirement of the crop being grown. DRC urges the Cabinet to re-impose the requirement that waste not be land applied at a rate exceeding the soil's infiltration capacity. DRC also urges the Cabinet to re-promulgate the requirements that waste be applied on a field for a maximum of three out of four years, and that soil pH be regulated.

Both nitrogen and phosphorus levels should be considered in the nutrient management plans. A study by Virginia Tech notes that "excessive concentrations of nitrate in groundwater have been found to exceed drinking water quality standards in many parts of the country with a concentrated poultry industry." Land application for these operations should be prohibited in the floodplain and on wetlands. Moreover, DRC contends that a filter strip of vegetation downhill from land application is essential to limit the amount of contaminants in runoff. If the filter strip is intended to "catch" runoff containing hog waste, it should not be permitted to count as part of the setback area, since it will itself be contaminated with hog waste. We also urge the Cabinet to prohibit the land application of hog waste on crops grown for human consumption.

Soil samples should be analyzed for nitrogen and phosphorus to help determine over time whether the uptake rate of the crop is being exceeded. It seems that some kind of analysis of potential pathogens should be required before land application of swine waste is conducted.

(b) Response: Specifically, the Comprehensive Nutrient Management Plan (CNMP), the Agriculture Water Quality Plan, and any applicable NRCS requirements will be evaluated collectively in the development of an appropriate nutrient management plan for a given CAFO operation.

**(102) Subject: Additional Regulatory Requirements – Pollution Control**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council  
Heather Roe Mahoney, Democracy Resource Center  
Swine and poultry waste lagoons can deliver a significant loading of ammonia and orthophosphates to streams in upset conditions. A water pollution control strategy that limits only nitrogen application and which fails to address cumulative loading of wastes onto lands (and corresponding declines in the absorptive capacity of soils) and the cumulative loading of wastes

onto lands within each watershed and sub-watershed, is a strategy that fails to satisfy the requirements of KRS Chapter 224 regarding prevention of water pollution.

Studies suggest that between 75% and 90% of the nitrogen treated in anaerobic lagoons and land applied volatilizes. A draft report by the state of North Carolina concludes that 67% of hog animal waste nitrogen is volatilized as ammonia, and 85% is redeposited within 60 miles of its source. This evidence indicates that waterways, lakes, and ponds in regions affected by intensive corporate hog farming are likely to suffer greatly from eutrophication and fish kills. These emissions also have a negative effect on native plant species and wildlife habitat. Studies suggest that large scale confined feeding operations with anaerobic lagoons and land application should not be encouraged with favorable regulations, as they are subject to much greater nitrogen emissions than composting of manure from shallow or deep bedded hog facilities. We urge the Cabinet to consider not only the effect of an individual facility, but also the aggregated environmental effects of these facilities.

(b) Response: The Cabinet recognizes the concern with ammonia transport via air deposition to waterbodies. The Cabinet would note however, using conservative assumptions, that a 1000 animal unit swine operation (for example) would contribute no more than a small fraction of a pound of nitrogen per acre in the area of deposition. Compared to the contributions from mineralization of soil organic matter, nitrogen fixing bacteria, and other sources, the contribution from swine operations would be minor, and would not be expected to negatively affect native plant species wildlife habitat, or significantly increase ambient levels of nitrogen in surface areas.

### **(103) Subject: Additional Regulatory Requirements – Pollution Control**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

Lagoons should not be permitted where previous mining activity has created a potential for subsidence. Pursuant to the regulation, (lagoon) dams should be checked for structural integrity, both in the design review, and through inspections once operational. Even with synthetic liners, lagoons must not be allowed to be located in the saturated zone. They should not be permitted in regions with karst topography unless groundwater flow is fully characterized and a monitoring system is in place that is capable of detecting migration of contaminants.

To ensure lagoon performance, a thorough site characterization should be performed, and lagoons should not be permitted in karst areas, in the saturated zone, or over springs. In the past, a lagoon at the city of Henderson wastewater treatment plant failed due to placement over a spring. Since there was a synthetic liner, the failure was evident through the “ballooning” of the liner. In a lagoon without a synthetic liner or groundwater monitoring, such a failure might go undetected.

Allowing a discharge during a 25-year/24-hour storm is inadequate. Since the same amount of rain falls over a period of days every few years, these facilities (lagoons) will be designed to fail at an unacceptable frequency. This does not reflect excusing a discharge that results from an unforeseeable act of God, but rather a known, predictable, fairly frequent event.

(b) Response: The proposed administrative regulation prohibits lagoons where a sinkhole, enclosed depression, or subsidence is evident. The 25-year/24-hour discharge allowance is not a part of this proposed administrative regulation. Rather, it is a part of the other KPDES regulations dealing with CAFOs.

### **(104) Subject: Additional Regulatory Requirements – Pollution Control**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council

Intensive hog and poultry production operations can be significant sources of air pollution, odors, surface and groundwater pollution, and can create a public nuisance. Some concerns associated with industrial-scale livestock production include:

- the need to carefully manage swine wastes because of the possibility of transmittal of flu viruses from swine to humans and from poultry via swine to humans;
- odors and gases within confinement buildings and emissions from anaerobic lagoons and land application buildings. These are major sources of ammonia and other noxious emissions, which should be assessed and controlled;
- excessive or inappropriate land application of wastes and wastewaters which can cause surface water pollution. Up to half of the nitrogen applied is not utilized and is transported through leaching, evaporation or runoff, along with phosphorus, copper, zinc and other trace metals and compounds;
- disposal of carcasses and of manure which can attract significant fly populations; surface waters which may be affected by ammonia off-gasses from lagoons, redeposited in nearby streams;
- excess nutrient loading into streams resulting in nuisance algal blooms, hypoxia (low oxygen levels) and anoxia (complete loss of oxygen), causing fish kills.
- nitrate contamination of surface and groundwater supplies. This is a significant public health concern, which has been associated with cancers of the stomach and urinary tract, as well as blue baby syndrome, spontaneous abortions and non-Hodgkin's lymphoma.

(b) Response: See response to comment # 13.

**(105) Subject: Additional Regulatory Requirements – Pollution Control**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council

Any proposed regulations addressing the environmental consequences of concentrated animal feeding operations must include prohibitions in air, water and waste laws against pollution causing environmental harm. Governor Patton recognized, in July of 1997, that regulations were needed for intensive livestock operations (to be) conducted “in a safe and environmentally sound manner to ensure a safe, healthy and beautiful environment and the continued and renewed ability of the Commonwealth’s farmers to maximize production on their farms ...”

(b) Response: See response to comment # 13.

**(106) Subject: Additional Regulatory Requirements – Pollution Control**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club

Heather Roe Mahoney, Democracy Resource Center

(5:074E) “Best Management Practices” establish certain natural features (floodplains, wetlands, sinkholes, etc.) and certain designated areas (wellhead protection area, state or national park, national forest, nature preserve) where CAFO facilities may not be constructed. Sierra Club supports these prohibitions.

There is ample evidence that animal waste lagoons should not be constructed in areas of active karst features, such as sinkholes, sinking streams and springs. The Sierra Club and DRC strongly disagree with the proposed regulation which effectively “grandfathers” in poultry houses, lagoons, litter storage structures, and composting facilities if they existed on February 14, 2000.



DRC also notes the Division's decision to exempt poultry CAFOs existing before February 14, 2000, from the siting requirements for dry litter storage facilities. However, we urge the Division to require these facilities meet the siting requirements as much as possible.

(b) Response: In the interest of fairness and economy, the Cabinet has balanced farming interest and environmental interest and permitted these structures to remain.

**(107) Subject: Additional Regulatory Requirements – Pollution Control**

(a) Comment: Wade H. Helm, Kentucky Conservation Committee  
Best Management Practices as delineated by the Kentucky Agriculture Water Quality Act should be stringently adhered to by CAFOs. NREPC should make waste management an enforcement priority.

(b) Response: The Cabinet will enforce its administrative regulations and appropriate Best Management practices.

**(108) Subject: Exemptions**

(a) Comment: Michael Hancock, KY Transportation Cabinet  
Provide for existing CAFOs to be “grandfathered” in terms of their current structures in cases where a state or Federal highway is constructed or re-constructed within the setback limits provided the CAFO complies with all other terms and conditions of their operating permit.

(b) Response: See response to comment # 89.

**(109) Subject: Water Usage**

(a) Comment: Patty Wilson, Citizen  
Large scale CAFO's, especially swine, use millions of gallons of water per year, per site. Such use has drained the water supplies in some areas. To avoid water shortages, limit the number of livestock and poultry raised in a specific area (region). Limit the withdrawal (number of sites, or gallons of water) from specific areas.

(b) Response: The use of water generally is addressed through the issuance of water withdrawal permits pursuant to 401 KAR 4:010. However, KRS 151.140 exempts agricultural users from having to obtain a water withdrawal permit. But in times of extreme drought, the Cabinet, upon declaration of a water emergency by the governor, may temporarily allocate the available water supply among water users, per KRS 151.200.

**(110) Subject: Integrator Liability – Against**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
Keith Tapp, Webster Co. Farm Bureau  
Co-permitting will place Kentucky farmers at a tremendous disadvantage. Co-permitting will severely limit the feeder cattle market. How will weaning facilities, cattle holding facilities, poultry litter removal services, and buyer stations be addressed regarding co-permitting? What affect will this have on the marketing capabilities of beef cattle in Kentucky? What about milk processors and livestock markets? Others who would be affected include corporate animal processors, nutritional consultants, agronomic consultants who direct management of land application areas, and contractors who remove carcasses for rendering. The regulation affects and includes certain production cooperatives, livestock pre-conditioning, order buying, commercial feedlots, auction houses and racetrack stables. The regulation will also affect smaller

farmers, for example, if they choose to place pigs out on contract with a local farmer who may have facilities but not the capital or marketing ability to own his own animals.

(b) Response: The Cabinet is aware of the importance of the poultry industry to the overall agriculture economy in Kentucky. With this economic growth however, several human health and environmental issues have arisen. The intent of this proposed administrative regulation is to protect human health and the environment. Healthy environmental conditions are necessary to support industries as well, especially tourism.

**(111) Subject: Integrator Liability – Against**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

During the June 1999 comment period on the Groundwater Protection Plan for Poultry Facilities on less than ten acres, the Cabinet responded to comments by stating that under Kentucky statutes only the person performing the activity is responsible for the plan. Is the inclusion of integrator liability on the permit in the CAFO regulation a direct contradiction of the Cabinet's June 1999 position and a violation of the previously cited statutes?

(b) Response: The Groundwater Protection Plan for Poultry Facilities is not a part of the KPDES program and was not based upon federal requirements for co-permittees. Thus, the issues involving the Groundwater Protection Plan were different than those involving the KPDES Program.

**(112) Subject: Integrator Liability – Support**

(a) Comment: Corrine Whitehead, Coalition for Health Concern

Integrator Liability is absolutely required. Ultimate corporate ownership of the hog industry in the US can be traced to Great Britain. European countries refuse to allow the crowded and inhumane production practices (that are permitted) in the United States.

(b) Response: See response to comment # 13.

**(113) Subject: Integrator Liability – Support**

(a) Comment: Susan Crosswait, Kentuckians for the Commonwealth

Integrator liability is the most effective way to let huge corporations know that Kentucky is serious about protecting the rights of the grower and the taxpayer. Corporations should be jointly liable for any damage done by their industry.

(b) Response: See response to comment # 13.

**(114) Subject: Integrator Liability – Support**

(a) Comment: Hunter and Vera Roberts, Citizens

We need stronger Integrator liability. CAFO growers and the corporate integrators should be excluded from all forms of development monies.

(b) Response: See response to comment # 13.

**(115) Subject: Integrator Liability – Support**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club  
Aloma Dew, Sierra Club

The Sierra Club strongly supports the improved language in Section 2. We believe the language in 401 KAR 5:074 is more clear than the language in 401 KAR 5:072. The proposed language

includes the terms, “exercises substantial operational control” over the CAFO. We were supportive of the prior regulation because we believed that this requirement was clearly intended, but we recognize that it was not as clearly spelled out as it is in the Emergency Regulation, and we support including this language in the final regulation.

On December 15, 2000, EPA published a proposed new CAFO regulation along with several hundred pages of preamble and comment on the existing Clean Water Act regulatory requirements for CAFOs. In this preamble, EPA stated; “EPA believes that ownership of the animals establishes an ownership interest in the pollutant generating activity at the CAFO that is sufficient to hold the owner of the animals responsible for the discharge of pollutants from the CAFO. The owner of animals at a feedlot, on the other hand, maintains all current interests in the animal and is merely paying the contract grower to raise the animals for the owner. It is the owner’s animals that generate most of the manure and wastewater that is created at a CAFO. Therefore, EPA believes that ownership of the animals may be sufficient to create responsibility for ensuring that their wastes are properly disposed of. This may be particularly true where the manure is sent off-site from the CAFO in order to be properly disposed of.” – 66 Federal Register, pages 3024, 3025, January 12, 2001.

Many growers’ contracts expressly identify the grower as an “independent contractor” in order for the integrator to avoid liability. However, the employment relationship created by those contracts is that of principal-agent. Tyson Foods, Inc. v. Stevens, 2000 WL 1716977 (Ala.) supports this conclusion. The concept of integrator liability fits easily within this agency context. In the event of an accidental spill or discharge from a land application area, both parties should be responsible for the cost of restoring the environment. The joint and several liability imposed on integrators through the permitting system prevents the companies from unfairly profiting at the expense of both the growers and the public.

(b) Response: See response to comment # 13.

**(116) Subject: Integrator Liability – Support**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council  
Heather Roe Mahoney, Democracy Resources Center  
Wade H. Helm, Kentucky Conservation Committee  
Victor Kennedy, Citizen  
Barbara Edwards Thomas, Citizen

(We) support the inclusion of integrator liability and recognize that primary responsibility for compliance with KPDES permit conditions rests with the owner of the animal generating the waste, and the one who is directing the manner in which the animal is raised and managed. We believe this is the single most important provision for environmental protection in the state and for the protection of farmers, neighbors, and taxpayers.

Co-permitting or integrator liability is one of the main provisions of the Federal EPA CAFO regulations, which are in the hearing process through the end of July. Federal government proposed regulations require “processors that exercise substantial operational control over contract growers to be co-permitted.”

Integrators are much better able to bear the costs of cleanup than Kentucky farmers and taxpayers. A 1997 study by Louisiana Tech University and the National Contract Growers Institute found that over 71.6 % of the nation’s poultry growers earn below poverty level income from their poultry operations. Without integrator liability, growers will be solely responsible for

clean-up costs in the case of environmental damage. If the grower cannot afford the costs, the burden will be placed on Kentucky taxpayers.

(b) Response: See response to comment # 13.

**(117) Subject: Integrator Liability – Support**

(a) Comment: W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club

The National Strategy states that corporate entities that exercise substantial operation or control of a CAFO must be co-permitted along with the CAFO as operators. Vertically integrated companies that created the industrial meat and poultry systems can prevent problems on the front end by not allowing too many houses to be built in the wrong location.

(b) Response: See response to comment # 13.

**(118) Subject: Integrator Liability – Support**

(a) Comment: Bernadine Edwards, Citizen

Make the big chicken companies responsible for all the pollution that they are doing to our state.

(b) Response: See response to comment # 13.

**(119) Subject: Integrator Liability – Support**

(a) Comment: Karol Welch, Magistrate, Hopkins County

To ask a business to be regulated is no different than regulating anything else that harms our state. The large companies are coming into Kentucky and taking advantage of us because we're a poor rural state. The large poultry and meat producing industries are simply in it for profit. Why should a contract between a farmer and a major poultry producing company excuse that company from the liability resulting from its profit making activities?

(b) Response: See response to comment # 13.

**(120) Subject: Integrator Liability – Support**

(a) Comment: Joe Knoepfler, Citizen

(Chicken litter is) a problem wherever the modern poultry industry has settled in with its dense population numbers. I see integrator liability as aiding the industry towards finding a solution to a problem that arises from the practices they themselves designed. It's not the fault of the contract grower; the system needs to be fixed, before it further damages the water here in Kentucky as it has elsewhere. I therefore support integrator liability.

(b) Response: See response to comment # 13.

**(121) Subject: Integrator Liability – Support**

(a) Comment: Sue Anne Salmon, Citizen

Corporate integrator liability takes some of the burden for cleaning up groundwater, rivers and creeks, and city water supplies, from the taxpayers and requires that the corporations share financial responsibility with the financially strapped growers. What reason exists not to hold these corporations financially accountable for the animals they own and control from start to finish?

(Also), make joint liability include payment for medical treatment of rural residents who contract respiratory illnesses such as histoplasmosis, intestinal disorders (e. coli and giardia), streptococcal infections, or depression and nervous disorders caused by CAFOs.

(b) Response: See response to comment # 13.

**(122) Subject: Integrator Liability – Long term**

- (a) Comment: Tom Fitzgerald, Kentucky Resources Council  
Aloma Dew, Sierra Club  
Heather Roe Mahoney, Democracy Resources Center  
Wade H. Helm, Kentucky Conservation Committee  
Sue Anne Salmon, Citizen  
Hunter and Vera Roberts, Citizens  
Susan Crosswait, Kentuckians for the Commonwealth

Large scale, corporate farming operations that export profits should not be permitted to profit through externalizing their costs by polluting Kentucky's environment and endangering the health of neighbors. Due to the size and intensive nature of industrial hog and poultry production and the complex waste management issues unique to hogs, (We) strongly urge the Division to adopt permanent regulations that provide greater protection to neighbors and communities than the emergency regulation which is now in place.

Some (environmental/health) problems may not show-up for years. It is essential that the corporations be held liable for future problems caused by the present uses of the land. For instance, the Cabinet could hold the corporate integrators jointly liable for up to 10 years after a contract ends or a facility is closed. This would ensure that any environmental damage caused by the CAFO that is found within 10 years of the end of the contract or closure will be the responsibility of the grower and the corporation.

The Cabinet could also require CAFOs to file a closure plan and post a bond to cover the cost of proper closure. These suggestions would help ensure that the corporate integrators are held jointly liable for problems that may not be detected until after a contract has ended or a facility has closed, yet were still caused by the CAFO.

- (b) Response: See response to comment # 13.

**(123) Subject: Lenient Regulations**

- (a) Comment: Heather Roe Mahoney, Democracy Resource Center  
Wade H. Helm, Kentucky Conservation Committee

DRC urges the Cabinet to look closely at the regulation and close loopholes, which may let some CAFOs off the hook. For instance, in Western Kentucky several community members have heard about growers splitting property titles of different poultry houses among family members in order to get around the 1,000 animal unit threshold. The Cabinet should find ways to close loopholes such as this.

Sham property divisions should not be allowed to avoid these regulations. The coal industry regulations no longer allow abuses by 2-acre permits and the SEC requires 5% ownership to be reported in order to maintain integrity of the stock market. Similarly, CAFOs should not go unregulated because a farm appears to have been broken into a few small pieces when operations are still integrated.

(Also) during fiscal year 2000, over \$3.6 million in cost-share dollars (tobacco settlement money) were awarded for the construction of permanent litter storage structures for poultry operations. This money should not be used to pay for permanent litter storage structures. The corporate integrators, which own the chickens and dictate how they are raised –companies that reap huge profits from these operations- should be responsible for paying for the litter storage

facilities.

(b) Response: See response to comment # 13. The use of cost share dollars is controlled by statutory and regulatory provisions other than KRS Chapter 224 and would not be an appropriate part of this proposed administrative regulation.

**(124) Subject: Litter Storage Facility**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau Building a six-month litter storage facility will cost 25 to 30 thousand dollars, as much as 65 thousand. Permanent litter storage is already included in the state Agriculture Water Quality Plan. If it is necessary, farmers need time to complete these facilities and cost-share money or financing.

(b) Response: The Cabinet recognizes the additional cost of building a permanent litter storage structure. However, the Cabinet also believes that proper waste handling is essential for the protection of human health and the environment. The ancillary benefits of retaining the nutrient value of the litter and easing the litter handling and cleanout aspects are also noted.

The Cabinet would also note that additional cost-share dollars were added during the legislative session this year. For further information about the availability of cost-share funds, please contact the Division of Conservation with the Cabinet.

Permanent litter storage is already a requirement of the Agriculture Water Quality Plan, which requires implementation by October, 2001. The Cabinet concurs that permanent litter storage should be required and that time is necessary for operations to come into compliance with this requirement. As such, the proposed administrative regulation has incorporated the Agriculture Water Quality Plan implementation date of October, 2001 as the construction deadline for permanent litter storage structures at poultry CAFOs.

**(125) Subject: Poultry Litter – Benefits**

(a) Comment: Bill Payne, Dairy Producer, Kentucky Milk Producer's Association  
Carole Knoblett, Kentucky Poultry Federation

Animal waste is a natural resource that can economically replace synthetic fertilizers. The proposed regulations will discourage the use of livestock manure in crop production. Farmers spread fertilizer on pastures as an organic fertilizer, give some to neighbors, and sell some to local grain farmers. Farmers have filled out and comply with Ag Water Quality Plans.

(b) Response: The proposed administrative regulation does not affect how animal waste is utilized by neighbors or local grain farmers who purchase such. Those individuals must handle animal waste in accordance with the Agriculture Water Quality Plan. This proposed administrative regulation only affects how operations defined as CAFOs operate. See response to comment # 71. This represents a very small universe of farming operations in Kentucky.

**(126) Subject: Manure Management and Responsibility**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council  
Aloma Dew, Sierra Club  
Heather Roe Mahoney, Democracy Resource Center  
W. H. Graddy, Attorney, Cumberland Chapter of the Sierra Club  
Wade H. Helm, Kentucky Conservation Committee  
Sue Anne Salmon, Citizen

Uniform standards are required for how and where litter storage sheds are built. Inadequate

storage and spreading of litter is a major health problem due to odor, airborne dust, flies, and runoff. Also, existing regulations need to be enforced – now!

We also encourage liability or chain of custody for litter/manure, so that someone is responsible for problems from runoff and wind-blown manure (particulates). There need to be strict regulations regarding litter/manure handling and dead bird/animal remains. Some mechanism is needed to ensure that chicken carcasses are housed and disposed of in a way that does not pose threats to human health either through water supplies or obnoxious odors. This is a health issue and must be addressed to protect the waters of the commonwealth.

Comprehensive nutrient management plans, that require waste and soil testing for phosphorous, nitrogen, and any heavy metals likely to present, should be required.

Growers and integrators should be required to demonstrate that the waste shall be handled in a responsible manner. Waste cannot be over-applied to fields or applied on frozen ground when it cannot be saturated. Also, some mechanism (written agreement/contract) is needed to ensure that growers don't give waste to people who will handle it irresponsibly. The buyer agrees to abide by the regulations and the setbacks, if the manure is to be stored or applied within Kentucky.

Open air hog waste lagoons, aerial spraying of wastes and unfiltered barn emissions from CAFOs should be banned.

(b) Response: Litter storage siting criteria is a part of the proposed administrative regulation. The Cabinet agrees that the storage and spreading of litter is a significant issue, and has sought to address that through both this proposed administrative regulation and the permitting process. This includes the development of a CNMP for each poultry CAFO, which addresses the manner in which litter is land applied and off-site transport of the waste. With respect to dead animal disposal see response to comment #127. The proposed administrative regulation also addresses co-permitting, for both the producer and the integrator where applicable. Finally, the Cabinet is not proposing to ban open air hog waste lagoons in this proposed administrative regulation.

**(127) Subject: Manure Management and Responsibility**

(a) Comment: Hunter and Vera Roberts, Citizens  
Bernadine Edwards, Citizen  
Linda Dempsey, Citizen  
Victor Kennedy, Citizen  
Barbara Edwards Thomas, Citizen

CAFO manure management should include a requirement that run-off from barns and soils, where manure has been spread, be tested for fecal coliform, nitrogen, phosphorus, heavy metals and any other health potential, and that the results of these tests be made available to the public.

A method is needed to ensure that dead chickens are housed and disposed of such that there is no threat to human health. You see piles of manure (at chicken CAFOs) and dead chickens laying on top of them, not covered, whether it is raining or not. Dead chicken carcasses, which are housed and spread with the chicken litter, are a great concern. Make farmers put up permanent litter storage buildings. Protect the children at play and other innocent bystanders during the spread of litter.

They (bird droppings) are supposed to be disked under on all fields they are placed on in the regulated amount of time. Some are still lying in the fields weeks later. These bird droppings

are dried and blowing in the wind.

(b) Response: Dead animal issues are regulated by the State Veterinarian pursuant to state statute KRS Chapter 263. Permanent litter storage is a requirement of this proposed administrative regulation. See also comment #130 from the Kentucky Department of Agriculture.

**(128) Subject: Manure Management and Responsibility**

(a) Comment: Debra Staley, Solid Waste Coordinator, Cumberland County  
Many have complained that farmers are spreading unprocessed manure (with dead bird remains). This is attracting buzzards. At this time they are dumping this waste onto fields using a “nitrogen-based” formula, ignoring excessive amounts of phosphorous and possibly arsenic. One suggestion is to require that all waste be processed (and tested) to determine the ingredients, and then market it accordingly.

(b) Response: NRCS Practice Code 590 (incorporated into the general KPDES permit) will address how both nitrogen and phosphorus concerns are to be addressed in both an agronomic and environmental manner. See also comment #130 from the Kentucky Department of Agriculture.

**(129) Subject: Manure Management and Responsibility**

(a) Comment: Susan Crosswait, Kentuckians for the Commonwealth  
Proper land application of manure is very important in protecting our water and controlling disease. We must have a way to make sure that manure is not over-applied and the soil poisoned. Corporations should pay for the storage buildings that house the manure their animals create. Don’t use our tobacco settlement money.

We must declare a chicken an “animal” and make sure that dead chickens are not applied with the manure. Last year the front page of the paper had pictures of this practice in Hopkins County.

(b) Response: The proposed administrative regulation utilizes siting criteria for land application to protect water quality. The use of tobacco settlement money for litter storage structures is not subject to this proposed administrative regulation. The definition of an animal to include a chicken for disposal purposes is not a part of this proposed administrative regulation. See also comment #130 from the Kentucky Department of Agriculture.

**(130) Subject: Manure Management – Dead Animals**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture  
The Department of Agriculture receives complaints about odor problems (from CAFOs) and makes a concerted effort to identify and correct those problems as part of a “good Neighbor” policy for agriculture.

There have been complaints about improper dead animal disposal. The Department of Agriculture has responsibility for dead animal disposal under current authority in KRS 257.160, and will respond to referrals by other agencies.

(b) Response: See response to comment # 13.

**(131) Subject: Notice of Violations and Corrective Action**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau



Neither the emergency regulation nor the draft permits describe a process for notice of violation, fine schedules, or corrective action. We suggest corrective action provisions similar to those in the Agriculture Water Quality Act be included in the regulation.

(b) Response: Processes for citing violations and setting civil penalties are found in KRS Chapter 224.

**(132) Subject: Loss of Small Farms in Kentucky**

(a) Comment: Dennis Liptrap, Hubbard Feeds

Keith Tapp, Webster Co. Farm Bureau

Swine production is at a historic low in Kentucky, due in part to the to the unsettled nature of regulations and (lack of) confidence in the future. Banks are refusing to loan money to the swine producers because they are concerned about their ability to sustain the operation over time.

Many producers are exiting the business. The people that are exiting the business are the small family farmers that desperately need choices to replace lost tobacco income.

(b) Response: The proposed administrative regulation does not prohibit Kentucky farmers from operating. The proposed administrative regulation is designed to protect human health and the environment.

**(133) Subject: Loss of Small Farms in Kentucky**

(a) Comment: Billy Cochran, KY Pork Producers

Emergency regulations have severely hampered many of Kentucky's pork producers from remaining competitive with contemporaries from other states. The proposed regulation gives the Cabinet the discretion to deem operations of any size as CAFOs, and require them to obtain a KPDES permit. In 1997, NREPC stated that their intent was not to place burdensome regulations on smaller producers. This stipulation could clearly place severe financial restraints on the many small livestock producers in Kentucky.

Smaller operations are currently required to obtain (and comply with) Kentucky No-Discharge Operational Permits. It seems unreasonable for the NREPC to force these smaller operations to follow CAFO regulations.

(b) Response: See responses to comment #s 62, 134 and 135. The Cabinet disagrees that the emergency regulations have hampered Kentucky's pork producers from remaining competitive with contemporaries from other states.

**(134) Subject: Loss of Small Farms in Kentucky**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

Jerry Lock, Grower

One of the leading opponents (of the Poultry Federation) said, "This (continued pursuit of permanent regulations) is a game to see who gets worn down first, and it must not be us". But this game affects many families in this state, their livelihood and their future. Proponents of the emergency regulation claim it is only for the "Bad Actors" in the industry, but unjust laws and regulations effect all producers, even the good family farmers.

(b) Response: The Cabinet disagrees that the proposed administrative regulation is "unjust". The proposed administrative regulation is necessary to protect human health and the environment.

**(135) Subject: Loss of Small Farms in Kentucky**

(a) Comment: Judith A. Villines, Attorney, Tyson Foods, Inc.  
Judith A. Villines, Attorney, Perdue Farms, Inc  
Billy Cochran, KY Pork Producers  
Otis Griffin, Farmer  
Morgan Rickard, Farmer

The Cabinet's approach (to require co-permitting) will inevitably contribute to the end of the small farm way-of-life in Kentucky. Small family farmers have been able to retain their farms because they have entered into contracts with poultry producers to raise their chickens for them. Now the producer will not enter into contracts with the farmers without provisions to minimize the producer's potential liability.

Most businesses and individuals can't afford to assume this level of liability. This stipulation will force companies and individuals to move their businesses to other states, or they (Corporations) will demand near complete control over a producer's permitted operation.

(b) Response: The proposed administrative regulation does not affect the small family farmer who maintains less than 1000 animal units unless designated on a case-by-case basis. See response to comment #61. The Cabinet disagrees that corporate agriculture will leave Kentucky. The co-permitting provision is designed to ensure proper protection of human health and the environment.

**(136) Subject: Profitability of Farming**

(a) Comment: Bill Payne, Dairy Producer, Kentucky Milk Producers

There has been a decreasing role (income) from tobacco for farmers. Livestock is a sound option, due to Kentucky's quality forages. The regulation limits the ability of some farmers to pursue this replacement income.

(b) Response: The Cabinet is aware of the diversification that Kentucky farmers are undergoing in light of income lost from tobacco, along with other factors. The proposed administrative regulation does not prohibit Kentucky farmers from operating.

**(137) Subject: Profitability of Farming**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture  
Under CAFO regulations, Kentucky agriculture, especially small producers, will be restricted from new or expanded income-producing animal operations, adversely affecting the growth of Kentucky's agricultural economy and negatively affecting the potential to increase profitability of farmers.

(b) Response: The Cabinet is aware of the need for a strong farm economy in Kentucky. The proposed administrative regulation does not prohibit Kentucky farmers from operating.

**(138) Subject: Profitability of Farming**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
Kentucky's current emergency regulation's inclusion of co-liability places our livestock farmers at a serious disadvantage to producers in other states. Already, the beef cattle industry has lost business as a result of out-of-state entities' concern over the KPDES permit program's potential for liability and uncertain enforcement. We ask that the Division recognize and consider the economic stability and competitiveness of Kentucky's farmers.

Similarly, by establishing overly restrictive setbacks and siting requirements, NREPC precludes the reasonable expansion, even establishment, of livestock operations by Kentucky farmers. Regardless of its intention and without any statutory jurisdiction, NREPC is effectively regulating economic viability and social policy for Kentucky agriculture. We ask that the Division stay within its charge of protecting the natural resources of our state.

The clear terms of the emergency regulation negate any well-meaning intent on behalf of the current NREPC or Division staff. Today, tomorrow or years from now any livestock operation in the state could be “designated” a CAFO at the discretion of Division (i.e., Division Director’s regulatory discretion to designate operations of less than 1,000 animal units). If NREPC truly does not intend to ever enforce this regulation against specific sectors or scales of production, the Division must guarantee this by specifically exempting these groups from the regulation.

(b) Response: The Cabinet is aware of the economic stability and need for Kentucky farmers to stay competitive. Concerns over the beef cattle industry are unfounded. The Cabinet is aware of very few beef producers who may qualify as a CAFO. In some cases, loss of out-of-state contracts may be due to misinformation, rather than legitimate concerns.

The Cabinet disagrees that setbacks and siting requirements are overly restrictive. See responses to comment #s 62, 66, and 67. Further, as suggested, the Cabinet is staying within its charge of protecting the natural resources of Kentucky.

With respect to the Cabinet's "well-meaning intent", the Division has not proposed or finalized any provision in an emergency or ordinary administrative regulation since this process started in 1997 that establishes the ability to "designate" an operation as a CAFO at the discretion of the Cabinet. The existing state KPDES regulations govern the designation process.

**(139) Subject: Profitability of Farming**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
The Division continues to succumb to the agenda pressures and exaggerated, often unsubstantiated, concerns of a vocal minority. Natural Resources and Environmental Protection Cabinet has allowed the CAFO regulation process to be driven by extreme social, moral and political agendas rather than sound scientific and realistic, reasonable environmental protection. The Division will begin to consider to incorporate social, political, moral, legal and economic concerns into any and all CAFO rules.

(b) Response: The comment is noted. This proposed administrative regulation is supported by statutory authority and is consistent with the federal Clean Water Act.

**(140) Subject: Profitability of Farming**

(a) Comment: Dennis Liptrap, Hubbard Feeds  
Setbacks represent a “taking of the land” by the Cabinet, by limiting the use of the land without compensation to the owners. Setbacks for application of wastes create an economic hardship on livestock producers because they require considerably more land for application and siting. Not only are livestock producers restricted from applying manure in the setback areas, but they must pay for (approved) commercial fertilizer to raise crops there.

(b) Response: This proposed administrative regulation does not constitute a taking under the United States and Kentucky Constitutions.

**(141) Subject: Positive Impact of Farming on Local Economy**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

Jerry Lock, Grower

The poultry industry has created jobs. It is a reliable source of income. The poultry industry has created a more competitive grain market and reduced transportation costs with local grain elevators. The poultry industry has created many job opportunities for area citizens increased the tax base substantially, replacing the tax base lost to the dwindling coal industry. Our farmers are now able to make a living and keep their family farms and quality of life. Property taxes have increased. Unemployment and welfare benefits have decreased. Economic growth has escalated. Complaints are few. The poultry companies have been good corporate citizens and have been very supportive of educational and civic organizations. They provide health insurance. They provide jobs with good starting wages to people with little education and encourage employees to work toward GEDs.

As a result of the poultry industry's arrival in Kentucky, many infrastructure improvements have been made including new water and wastewater treatment plants. Loans to poultry farmers have not been delinquent and have been paid faster than expected. Lenders need assurance that operations will continue after the permitting period expires. The continuing success of poultry and the ability of farmers to expand are critical to our local economy. We must balance emotions with facts. What will the effects be on our local communities if these regulations are implemented?

(b) Response: The Cabinet is aware of the importance of the poultry industry to the overall agriculture economy in Kentucky. With this economic growth however, several human health and environmental issues have arisen. The intent of this proposed administrative regulation is to protect human health and the environment. Healthy environmental conditions are necessary to support industries as well, especially tourism.

**(142) Subject: Negative Impact of Farming on Local Economy**

(a) Comment: Susan Crosswait, Kentuckians for the Commonwealth

Studies show that the local economy will become more transient and social services will be under more of a strain, when the meat industry moves into a region. Dr. Donald Stull published these findings in an article entitled, "Tobacco barns and chicken houses in western Kentucky".

(b) Response: The Cabinet notes the comment. See response to comment # 13.

**(143) Subject: Negative Impact of Farming on Local Economy**

(a) Comment: Tom Fitzgerald, Kentucky Resources Council

Aloma Dew, Sierra Club

Intensive livestock operations are a component of a system of industrial production through an integrated structure of companies, investors and contractors. Under the contract model, farm-level control over agricultural production decisions is replaced by corporate control through the contracts, relegating farm-level workers to the role of hired labor. The environmental and human health costs associated with these industrial scale operations and the management of the wastes and wastewaters generated by these facilities must be fully accounted for by the facilities and those who control the production decisions. If environmental damage occurs, if neighbors lose value and enjoyment of their homes and properties, if the communities suffer pollution, it should not be the contract farmer that bears the entire cost of remedying whatever problems might arise.

Integrator liability is essential to protect our farmers who are fighting to stay on the land but are placed in the position of having to pay all the costs involved in meeting environmental and legal requirements.

(b) Response: See response to comment # 13.

**(144) Subject: Need for Industrial Agriculture**

(a) Comment: Bill Payne, Dairy Producer, Kentucky Milk Producer's Association  
Many dairy farms currently milk 100 or 200 cattle. In order to produce milk in a manner that's rewarding environmentally and economically, dairies will have to increase in size. Livestock production, including increasing the scale of operations, should be viable alternatives. Dairies need the flexibility to engineer a design to fit specific sites.

Why are we afraid to let agriculture expand? Without CAFOs one could not produce the meat products at a price that any of us could afford. If we destroy that industrial base as farmers, we have destroyed our livelihood.

(b) Response: The Cabinet is aware of the expanding nature of individual farm size in Kentucky, and across the nation. For a dairy or beef operation to be defined as a CAFO, generally there would need to be more than 700 dairy or 1000 beef, respectively, confined on the operation. Some beef operations in Kentucky, for example, maintain more than 1000 head of beef, but do not do so in a confined manner. This proposed administrative regulation is not designed so as to prevent future expansions.

**(145) Subject: Let's Work Together**

(a) Comment: Judith A. Villines, Attorney, Tyson Foods, Inc.

Judith A. Villines, Attorney, Perdue Farms, Inc.

Withdraw this regulation, which is fraught with legal problems, and work with the poultry producers and growers within the state to arrive at a solution allowing the small poultry farmers of Kentucky to thrive while not compromising environmental quality.

(b) Response: The Cabinet has received a broad range of input from interests on all sides of this issue including citizens, commodity groups, business organizations, environmental groups, local government, academic institutions, and various state and federal government agencies. The Cabinet appreciates the willingness of these various interests to work toward the development of reasonable environmental regulations. However, it has been very difficult to reach broad consensus among the various interests. The proposed administrative regulation provides appropriate protection of human health and the environment.

**(146) Subject: Let's Work Together**

(a) Comment: Dennis Liptrap, Hubbard Feeds

The Cabinet should work with livestock producers to protect the environment and not worry about controlling structure changes driven by the market. Compromise regulations are needed.

(b) Response: See response to comment #145.

**(147) Subject: Let's Work Together**

(a) Comment: Ira Linville, Environmental Specialist, KY Department of Agriculture  
If regulations are to be developed, let's do it as a team including agriculture, environmentalists, regulators, and technical assistance agencies, using the best technology to meet the needs of the

environment and help our farmers survive. I commit the resources and the staff of the Kentucky Department of Agriculture to assist in such an effort.

(b) Response: See response to comment #145.

**(148) Subject: Let's Work Together**

(a) Comment: Rebeckah Freeman, Director, Natural Resources, Kentucky Farm Bureau  
Kentucky Farm Bureau stands willing to set aside the ongoing contentiousness of this issue in order to work with NREPC and all other interested parties to arrive at a workable solution for the KPDES permitting of CAFOs/designated AFOs. Our members sincerely care about Kentucky's environment and our quality of life, and do not oppose lawful, reasonable regulations and permits. Unfortunately, we continue to strongly believe that this emergency regulation is neither lawful nor reasonable.

(b) Response: See response to comment #145.

## VI. Summary of Notice of Intent Statement of Consideration and Action Taken

On March 23, 2001, the Kentucky Natural Resources and Environmental Protection Cabinet, Division of Water submitted a Notice of Intent to Promulgate an Administrative Regulation to the Regulations Compiler for publication in the May *Administrative Register of Kentucky*. Public hearing to receive comments on the Notice of Intent for this administrative regulation were conducted May 22, 2001, at 6:30 p.m. Central Time at the Madisonville Technical College, Byrnes Auditorium, 750 North Lafoon Drive, in Madisonville, Kentucky.

The Natural Resources and Environmental Protection Cabinet (NREPC), Division of Water received written and oral comments from sixty-two (62) individuals and organizations. In addition to the representatives of the issuing administrative body, ninety-eight (98) people attended the public hearing.

The Cabinet has reviewed all comments received before the adjournment of the public hearing. In response, the Cabinet files this Notice of Intent Statement of Consideration and the proposed new administrative regulation 401 KAR 5:074 that is the subject of the Notice of Intent.

In addition to filing the Notice of Intent Statement of Consideration, the Cabinet is filing the proposed new administrative regulation 401 KAR 5:074 that is the subject of the Notice of Intent.

The proposed ordinary administrative regulation differs from the emergency administrative regulation by clarifying that footnote 4 also applies to “Roadways, primary (state and federal)”.

The proposed new administrative regulation will be published in the July *Administrative Register of Kentucky*. 401 KAR 5:074 will be the subject of a public hearing July 23, 2001 at 6:30p.m. Central Time, at the Madisonville Technical College, Byrnes Auditorium, 750 North Lafoon Drive, Madisonville, Kentucky.